THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx. North Gall.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir H. F. Dickens, K.C.
Vice-Chairman—T. R. Hughes, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir E. M. Pollock, M.P. . Attorney-General.
Sir Leslie F. Scott, M.P. . . . Solicitor-General.
A. C. Peake, Esq., President of the Law Society.

ELECTED MEMBERS.

T. J. C. Tomlin, Esq., K.C. W. R. Sheldon, Esq.	Lincoln's Inn.
Sir H. F. Dickens, K.C. Sir Hugh Fraser.	Inner Temple.
A. Macmorran, Esq., K.C. Arthur Powell, Esq., K.C.	Middle Temple.
Edward Clayton, Esq., K.C. W. Greaves-Lord, Esq., K.C., M.P.	Gray's Inn.
T. R. Hughes, Esq., K.C., of Lincoln's Inn. E. W. Hansell, Esq., of the Inner Temple.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks). Sir Walter Trower (Firm—Messrs. Trower, Still & Co.).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 30, Montague Street, W.C. 1.

1922.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL;

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

REPORTERS.

Court of Appeal . .	G. A. STREETEN, W. IVIMEY COOK,	*Barristers-at-Law.*
Probate and Divorce .	J. R. BROOKE,	*Barrister-at-Law.*
Admiralty Cases . .	E. C. M. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases .	C. F. JEMMETT (the late),	*Barrister-at-Law.*

1922.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98–99, FETTER LANE, LONDON, E.C. 4.

BIBL.
LONDIN.
UNIV.

JUDGES

OF THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1922.

Sir H. E. Duke, President.
Sir Maurice Hill, Knt.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1922

JUDGES

OF

THE COURT OF APPEAL.

1922.

Viscount Birkenhead, Lord Chancellor.

Lord Trevethin, Lord Hewart — Lords Chief Justices of England.

Lord Sterndale, Master of the Rolls.

Sir J. Eldon Bankes,
Sir T. Rolls Warrington,
Sir T. E. Scrutton,
Sir J. R. Atkin,
Sir R. Younger,
— Ordinary Judges of Court of Appeal.

Sir H. E. Duke, — President of the Probate, Divorce, and Admiralty Division.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1922, will be as follows:—

In the First Series,
[1922] 1 Ch. [1922] 2 Ch.

In the Second Series,
[1922] 1 K. B. [1922] 2 K. B. [1922] P.

In the Third Series,
[1922] 1 A. C. [1922] 2 A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Adams, In re. Benton *v.* Powell	240

B.

Benton *v.* Powell. In re Adams	240
Boulton *v.* Boulton	229
Brailey *v.* Brailey (C. A.)	15
Brogan, In the Estate of	276
Busche, In the Estate of	30

C.

Campbell *v.* Campbell	187
Countess, The (C. A.)	41

D.

Dayrell-Steyning *v.* Dayrell-Steyning	280

G.

Garratt *v.* Garratt	230
Gault, In the Estate of	195
Graygarth, The (C. A.)	80
Grey, In the Estate of	140

H.

	PAGE
Harlow, The	175
Hermione, The	162

I.

Ibis VI. (No. 2), In re	4
Ile de Ceylan, The	256

J.

Joannis Vatis, The (C. A.)	92
Joannis Vatis (No. 2), The	213

L.

Lister *v.* Lister	227
Loredano, The	209

M.

McLaughlin, In re	235
McLeod *v.* Shrewsbury (Earl). In the Matter of Shrewsbury (Earl)	112
Mann *v.* Mann	238
May, In the Estate of	33n.

PAGE

Mesopotamia Operations, 1917, In the Matter of. The Sulman Pak 73
Mogileff (No. 2), The (C. A.) 122
Monsell *v.* Monsell 34

P.

Powell, Benton *v.* In re Adams 240
Powell *v.* Powell 278

R.

Ran, The (C. A.) 80
Rutherford *v.* Rutherford (C. A.) 144

S.

PAGE

San Onofre, The (C. A.) 243
Shrewsbury (Earl), In the Estate of. McLeod *v.* Shrewsbury (Earl) 112
Smith *v.* Smith 1
Sulman Pak, The. In the Matter of Mesopotamia Operations, 1917 73

T.

Tervaete, The 197
Tervaete, The (C. A.) 259

Z.

Zelo, The 9

TABLE OF CASES CITED.

A.

		PAGE
Adam Penreth's Case	(1301) Trin. 29 E. 1; Y. B. Ed. II., 1678, p. 42	137
Adriatic, The	3 Asp. M. L. C. 16	246
Africano, The	[1894] P. 141	96
Aline, The	1 W. Rob. 111	261
American (The) and The Syria	L. R. 6 P. C. 127	80
Anglo-Newfoundland Development Co. *v.* The King	[1920] 2 K. B. 214	124
Annette (The) and The Dora	[1919] P. 105	199
Archer (H.M.S.)	[1919] P. 1	211
Argentino, The	13 P. D. 191	11, 247
Assunta, The	[1902] P. 150	106
Athol, The	1 W. Rob. 374	198
Attorney-General for New South Wales *v.* Curator of Intestates' Estates	[1907] A. C. 519	210

B.

Banda and Kirwee Booty, The	L. R. 1 A. & E. 109	74
Bengal, The	Swa. 468	221
Beta, The	5 Asp. M. L. C. 276	246
Blow Boat, The	[1912] P. 217	180
Bold Buccleugh, The	7 Moo. P. C. 267	260
Bourne *v.* Bourne	[1913] P. 164	227
Broadmayne, The	[1916] P. 64	204, 261
Brown *v.* Feeney	[1906] 1 K. B. 563	36
Brydges *v.* Brydges	[1909] P. 187	36

C.

Calvin's Case	7 Rep. 1	203
Canadian Pacific Railway Company *v.* Storstad (The)	[1920] A. C. 397	46
Candy *v.* Maugham	6 Man. & G. 710; 13 L. J. (C. P.) 17	122, 137
Castlegate, The	[1893] A. C. 38	198, 261
Cattle *v.* Stockton Waterworks Co.	L. R. 10 Q. B. 453	11
Cave *v.* Torre	54 L. T. 515	117
Celt, The	3 Hagg. Adm. 321	246
Chile, The	[1914] P. 212	128
City of Lincoln, The	15 P. D. 15	246
Clark *v.* Chambers	3 Q. B. D. 327	247
Collins *v.* Collins	115 L. T. 936	148
Constitution, The	4 P. D. 39	263
Courier, The	Lush. 541	262
Cox *v.* Cox	L. R. 2 P. & M. 201	148
Crawford *v.* Crawford	11 P. D. 150	148
Cunningham *v.* Cunningham	77 L. T. 405	36
Currie *v.* M'Knight	[1897] A. C. 97	260

D.

		PAGE
De Blaquiere *v.* De Blaquiere	3 Hagg. Ecc. 322	193
Despatch, The	14 Moo. P. C. 83	249
Devonshire, The	[1912] A. C. 634	82, 186
Diana, The	Lush. 539	262
Dictator, The	[1892] P. 304	214, 260
Douglas, The	7 P. D. 151	11
Drummond *v.* Parish	3 Curt. 522	141
Duchesse de Brabant, The	Swa. 264	215
Duke of Buccleuch, The	[1892] P. 201	96
Dundee, The	2 Hagg. Adm. 137	223
Dupleix, The	[1912] P. 8	97, 214

E.

Earl, In the Goods of	L. R. 1 P. & M. 450	236
El Rayo	1 Dods. 42	78
Emilie Millon, The	[1905] 2 K. B. 817	48
Englishman, The	[1894] P. 239	178
Errington *v.* Attorney-General	Bunb. 303	123
Europa, The	Br. & Lush. 210	225
Exchange, The	7 Cranch, 116	207

F.

Feldmarschall, The	[1920] P. 289	74
Forster *v.* Forster	1 Hagg. Cons. 144	279
Freedom, The	L. R. 3 A. & E. 495	214

G.

Gapp *v.* Bond	19 Q. B. D. 200	180
Gattward *v.* Knee	[1902] P. 99	141
Gault, In the Estate of	[1922] P. 195	277
Gemma, The	[1899] P. 285	214
Gertrude, The	13 P. D. 105	215
Gibbs *v.* Harding	L. R. 5 Ch. 336	20
Gladstone *v.* Musurus Bey	1 H. & M. 495; 32 L. J. (Ch.) 155	205, 272
Glamorganshire, The	13 App. Cas. 454	96
Godfroy *v.* Dalton	6 Bing. 460	164
Godman *v.* Godman	[1920] P. 261	141
Graygarth, The	[1922] P. 80	176

H.

H.M.S. Archer	[1919] P. 1	211
Hailstone, In re	[1909] P. 118	117
Hankinson *v.* Barningham	9 P. D. 62	112
Hannibal, The	L. R. 2 A. & E. 53	246
Harriman *v.* Harriman	[1909] P. 123	150, 229
Hart *v.* Hart	18 Ch. D. 670	19
Hartley *v.* Hartley	35 Times L. R. 298	148
Hiscock, In the Goods of	[1901] P. 78	141
Hobbs *v.* London and South Western Railway Company.	L. R. 10 Q. B. 111	247
Hope, The	1 W. Rob. 154	221

I.

		PAGE
Ida, The	Lush. 6	260
Imperial Japanese Government *v.* P. & O. Co.	[1895] A. C. 644	264

J.

James W. Elwell, The	[1921] P. 351	256
Jassy, The	[1906] P. 270	198
Jeffries *v.* Great Western Railway Company	5 E. & B. 802	11
Jenkins *v.* Great Central Railway Company	Shipping Gazette, Jan. 13, 1912	69
John, The	1 Dods. 363	78
John and Mary, The	Swa. 471	221

K.

Kalamazoo, The	15 Jur. 885	221
Kirkwall, The	11 Asp. M. L. C. 173	246
Kong Magnus, The	[1891] P. 223	223
Kronprinz Olav, The	[1921] P. 52	46

L.

La Bellone	2 Dods. 343	74
Lancaster *v.* Lancaster	[1896] P. 118	20
Larivière *v.* Morgan	L. R. 7 Ch. 550	205, 272
Leycester *v.* Logan	3 K. & J. 446	68
Limond, In re	[1915] 2 Ch. 240	141
Linton *v.* Linton	15 Q. B. D. 239	192
Lipman *v.* Lipman	[1916] P. 25	227
Little *v.* Spreadbury	[1910] 2 K. B. 658	164
London, The	[1914] P. 72	247
Long *v.* Long	15 P. D. 218	148
Loraine *v.* Loraine	[1912] P. 222	233
Lord *v.* Lord	[1900] P. 297	2
Lorena, The	Unreported	214

M.

M. *v.* M.	26 Times L. R. 305	36
Mac, The	7 P. D. 126; 4 Asp. M. L. C. 555	178, 181
McMahon *v.* Field	7 Q. B. D. 591	247
Maconochie *v.* Maconochie	[1916] P. 326	36
Magdalena Steam Navigation Company *v.* Martin	2 E. & E. 94	262
March *v.* March	L. R. 1 P. & M. 440	232
Marpessa, The	[1891] P. 403	97
Maxwell *v.* Wolseley (Viscount)	[1907] 1 K. B. 274	36
May, In the Estate of	[1922] P. 33n.	33
Meatyard, In the Goods of	[1903] P. 125	236

		PAGE
Mecca, The	[1895] P. 95	260
Mellona, The	3 W. Rob. 7	251
Midwinter *v.* Midwinter	[1892] P. 28	234
Mighell *v.* Sultan of Johore	[1894] 1 Q. B. 149	262
Miller *v.* Miller	Times News. Mar. 9, 1905; July 23, 1907	148
Mogileff, The	[1921] P. 236	122
Montague *v.* Davies, Benachi & Co.	[1911] 2 K. B. 595	257
Morgengry, The	[1900] P. 1	178
Mudlark, The	[1911] P. 116	178
Munden *v.* Brunswick (Duke)	4 C. B. 321; 10 Ad. & E. 656	263
Musurus Bey *v.* Gadban	[1894] 2 Q. B. 352	262

N.

Nelson *v.* Couch	33 L. J. (C. P.) 46	222
Newbattle, The	10 P. D. 33	199, 261
Newen, In re	[1903] 1 Ch. 812	164
Nordstern, The	1 Acton, 128	78
North, In re	76 L. T. 186	233

O.

Okehampton, The	[1913] P. 173	11
Orient, The	L. R. 3 P. C. 696	222
Otway, The	Unreported	170

P.

Parlement Belge, The	5 P. D. 197	131, 198, 260
Paul *v.* Paul	L. R. 2 P. & M. 93	232
Peaceable *v.* Watson	4 Taunt. 16	241
Pensher, The	Swa. 211	251
Pitgaveney, The	[1910] P. 215	246
Polemis and Furness, Withy & Co., In re	[1921] 3 K. B. 560	247
Porto Alexandre, The	[1920] P. 30	198, 263
Prins Frederik, The	2 Dods. 451	199
Prinz Adalbert, The	[1918] A. C. 500	128

Q.

Queen, The	L. R. 2 A. & E. 53	246
Quickstep, The	15 P. D. 196	82

R.

Ran, The	[1922] P. 80	176
Rankine, In the Estate of	[1918] P. 134	236
——— *v.* Raschen	4 R. 725	46
Rayne, Ex parte	1 Q. B. 982	224
Reg. *v.* Birmingham Overseers	1 B. & S. 763	241
—— *v.* Exeter Guardians	L. R. 4 Q. B. 341	241

		PAGE
Reg. *v.* Leresche	[1891] 2 Q. B. 418	279
Reid *v.* Stearn	6 Jur. (N. S.) 267	123
Remorquage à Hélice *v.* Bennetts	[1911] 1 K. B. 243	11
Ripon City, The	[1897] P. 226	207, 260
River Weir Commissioners *v.* Adamson	2 App. Cas. 743	48
Robinson *v.* Robinson	1 Sw. & Tr. 362	147

S.

Salisbury (Lord) *v.* Nugent	9 P. D. 23	112
Sickert *v.* Sickert	[1899] P. 278	279
Sly *v.* Sly	2 P. D. 91	241
Smith, In the Goods of	[1904] P. 114	236
Snark, The	[1900] P. 105	11
South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord	[1897] 2 Ch. 487	262
Stella del Norte, The	5 C. Rob. 349	74
Stephens *v.* Olive	2 Bro. C. C. 90	27
Stillwell, In re	[1916] 1 Ch. 365	189
Stocker *v.* Stocker	[1917] P. 264	36
Strousberg *v.* Republic of Costa Rica	44 L. T. 199	262
Sturgis *v.* Boyer	24 Howard's Rep. 110	89
Summers *v.* Ball	8 M. & W. 596	16
Synge *v.* Synge	[1900] P. 180	279

T.

Tasmania, The	13 P. D. 110	260
Taylor *v.* Witham	3 Ch. D. 605	241
Temiscouata, The	2 Spinks, 208	214
Thompson *v.* Thompson	[1916] P. 165	227
Thuringia, The	1 Asp. M. L. C. 283	246
Ticonderoga, The	Swa. 215	199, 269
Tobin *v.* The Queen	33 L. J. (C. P.) 199	262
Triumph (The) and The Usk	[1917] P. 127	74
Tryst, The	[1909] P. 333	246
Turner *v.* Hardcastle	11 C. B. (N. S.) 683	103

U.

Umona, The	[1914] P. 141	82
Union Steamship Company *v.* Aracon (Owners of)	L. R. 6 P. C. 127	80
United States of America *v.* Auxiliary Schooner Liberty and Steamship Carolinian	Unreported	261
Utopia, The	[1893] A. C. 492	11, 198, 261

V.

Vavasseur *v.* Krupp	9 Ch. D. 351	272
Victoria, The	13 P. D. 125	45
Volant, The	1 W. Rob. 383	221
Vryheid, The	2 C. Rob. 16	74

W.

		PAGE
W. H. No. 1 (The) and The Knight Errant	[1910] P. 199; [1911] A. C. 30	83
Wallace *v.* M'Dowell	[1920] 2 I. R. 194	112
Wargent *v.* Hollings	4 Hagg. Ecc. 245	241
Warkworth, The	9 P. D. 145	82, 178
Watkins *v.* Watkins	[1896] P. 222	189
Weld-Blundell *v.* Stephens	[1920] A. C. 956	247
Wild Ranger, The	Br. & Lush. 84	214
Williams *v.* Williams	[1921] P. 131	238
Wilson *v.* Newport Dock Company	L. R. 1 Ex. 177	251
——— *v.* Wilson	5 H. L. C. 40	17
——— *v.* ———	3 Hagg. Ecc. 329n.	193
Wily *v.* Wily	[1918] P. 1	279
Winkfield, The	[1902] P. 42	11, 97
Worrall *v.* Jacob	3 Mer. 256	27
Worsley *v.* Worsley	L. R. 1 P. & M. 648	232

CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

DIVORCE.

1921
Nov. 1.

SMITH *v.* SMITH AND REED.

Divorce—Practice—Knowledge of Co-respondent that Respondent was married—Damages—Costs—Discretion of Judge—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 51—*Judicature Act,* 1890 (53 *&* 54 *Vict. c.* 44), *s.* 5—*Statute Law Revision Act,* 1892 (55 *&* 56 *Vict. c.* 19), *s.* 1.

Though there has grown up a practice in the Divorce Court not to condemn a co-respondent in costs unless it is proved that he knew that the respondent was a married woman, that practice does not override the general discretion given to the judge by Statute to give costs in such a case if the circumstances make it reasonable. A similar rule as to damages is well established.

THIS was a husband's petition for divorce on the ground of his wife's adultery. He was an engineer's fitter, the son of a labourer, and his wife was the daughter of a carpenter. They were married in the autumn of 1916, and lived happily together until eight months after the marriage, when he was sent on active service to Salonica. He did not return

1921

SMITH v. SMITH AND REED.

to England until March, 1919. His wife went into domestic service with Mrs. Symons, the wife of the managing director of a picture palace at Reading. The co-respondent was the manager of this palace. In January, 1919, she was advanced in pregnancy and had to make a confession to the petitioner's mother; about the same time she wrote to the petitioner a letter confessing her fault, which contained very strong expressions of real affection. After the petitioner's arrival in England he brought this petition. The respondent put in no answer. The co-respondent put in an answer admitting one act of intercourse, but pleaded that he only knew the respondent as "Florrie," and had no knowledge that she was a married woman.

C. T. Williams for the petitioner.

R. Bush James for the co-respondent contended that as the co-respondent had no knowledge that the respondent was a married woman he ought not to be ordered to pay damages or costs. He cited *Lord* v. *Lord and Lambert* (1) on the question of costs.

THE PRESIDENT (SIR HENRY DUKE) [after stating the facts:] On these facts I have to consider whether the petitioner should be awarded damages and costs against the co-respondent.

As regards damages I am glad to say that it is well established now that a plea of ignorance is no bar to an award of damages. The fact of knowledge is an aggravation, but absence of knowledge is not a bar. It cannot be said that the loss suffered by the petitioner is negligible, or that his wife was not a good wife until she met the co-respondent. It is true that the petitioner and respondent are both in poor circumstances, and that the co-respondent is not a person of large pecuniary means; but I cannot approve the suggestion that there should be no award of damages in this case. Taking into consideration the superior position of the co-respondent and the indifference with which he

(1) [1900] P. 297, 301.

1921

SMITH v. SMITH AND REED.

The President.

misconducted himself with this young woman, who was in all probability the wife of a soldier on active service, I assess damages at 50*l.* and order that sum to be paid into Court within fourteen days.

Next as to costs. In these cases I am day by day impressed with the consideration that the costs of divorce proceedings must inevitably fall upon one or other of the parties. The petitioner comes to this Court to claim redress for a wrong done to him, wittingly or unwittingly, by the co-respondent. He cannot obtain relief for that wrong unless he resorts to this Court. It is said that, following an inveterate practice, the Court should not award costs against a co-respondent who was not informed and did not ascertain that the respondent was a married woman; and that the petitioner ought to be required to show that the co-respondent had that guilty knowledge. I confess that I have never seen the elementary justice on which that rule of practice is founded, and I do not see it now. It is quite true that there has been such a practice, but the Matrimonial Causes Act, 1857, s. 51, put the question of costs entirely in the judicial discretion of the Court. That section has been repealed by the Statute Law Revision Act, 1892, s. 1, only because the Judicature Act, 1890, s. 5, gave the Court a power as to costs of a more comprehensive character.

I have been referred to *Lord* v. *Lord and Lambert.* (1) In that case, where the petitioner had adduced no evidence as to the co-respondent's knowledge that the respondent was a married woman, petitioner's counsel said that he was not in law entitled to ask for costs against the co-respondent. Gorell Barnes J. said: "That is discretionary"; and after hearing a submission by co-respondent's counsel, the learned judge said (1): "The petitioner has not given the evidence," —i.e., as to the co-respondent's knowledge—"and therefore, unless there is something exceptional, there will be the usual result in such cases: no order as to costs."

The learned judge in that case exercised his discretion upon the facts. I find here a man of superior condition who

(1) [1900] P. 297, 301.

1921

SMITH v. SMITH AND REED.

committed adultery with the wife of a soldier. He did not pause to consider whether she was married or not, and in the exercise of my discretion I condemn the co-respondent in the costs of these proceedings.

Solicitors for petitioner: *Berry Tompkins & Co.*
Solicitors for co-respondent: *Helder, Roberts, Giles & Co.*

J. R. B.

1921
July 28;
Oct. 28.

ADMIRALTY.

THE IBIS VI. (No. 2).

Shipping—Practice—Costs—Allowance to seafaring Witness—Measure of Compensation for Detention—Guiding Principles.

The mate of the plaintiffs' fishing vessel, through being detained ashore for twenty-five days to give evidence at the trial of a collision action, was prevented from sailing on a voyage on which he would have earned 280*l.* as his share of the catch. The plaintiffs, who were successful in the action, paid the witness the 280*l.*, and, on taxation, the assistant-registrar allowed the item in the plaintiffs' bill of costs as chargeable against the defendants. The defendants appealed, and the matter ultimately went to the Court of Appeal, which laid down certain guiding principles as to allowances to witnesses and sent the case back for reassessment: [1921] P. 255.

On reconsideration the assistant-registrar allowed the sum of 250*l.*, and the defendants again appealed:—

Held, by Sir Henry Duke P., that the assistant-registrar had properly applied the directions given by Lord Sterndale M.R. in which Warrington L.J. concurred—namely, that the amount to be awarded should be "the reasonable compensation to a person of the class of the witness, taking into account all the circumstances and considering the wages which the witness was earning about the time of detention not as an absolute measure, but an important indication and guide of what is fair. The fact that all persons are under an obligation to give evidence when called upon should also not be ignored." The appeal therefore failed.

APPEAL SUMMONS (adjourned into Court) to review an item in a bill of costs in respect of the allowance to a witness for loss of time and earnings while detained ashore from November 8 to December 3, 1918.

The facts are summarized in the headnote and sufficiently

appear from the judgment. They will be found fully set out in the report of the previous proceedings when the matter came before the Court of Appeal and was sent back to the assistant-registrar for reassessment of the item in question. (1)

The assistant-registrar on reconsideration allowed the sum of 250*l.* instead of the full amount 280*l.* 11*s.* 5*d.* previously allowed, and the defendants again appealed on the ground that he had not given effect to the principles laid down in the judgments of the Court of Appeal, and in particular to the reasons for the judgment pronounced by Younger L.J.

The assistant-registrar reported that he had awarded such a sum as in his opinion was, in the words of the Master of the Rolls, "reasonable compensation" to a man whose earnings on the voyage during which he was detained would have amounted to more than 11*l.* per diem, and on the preceding voyage amounted to a still larger sum. Those facts he had taken as "an important indication and guide of what was fair" but "not as an absolute measure." He had taken into account all the circumstances and had not ignored the fact that the witness was under an obligation to give evidence under his subpœna. The amount allowed was calculated at the rate of 10*l.* per diem for the twenty-five days during which the detention lasted.

Stranger for the defendants (appellants).

Dumas for the plaintiffs.

Cur. adv. vult.

Oct. 28. THE PRESIDENT (SIR HENRY DUKE). I have had an opportunity of considering the judgments of the Court of Appeal in this matter and of applying them to the question raised between the parties. The summons was to review an allowance by the assistant-registrar in respect of the costs of securing the evidence of a witness who was the mate of a fishing vessel. North Sea fishermen at the time in question were making enormous profits, and the allowance in the first instance was 280*l.* 11*s.* 5*d.* The basis of the

(1) [1921] P. 255.

1921

THE IBIS VI. (No. 2).

The President.

allowance was that the witness had been detained on shore when otherwise he would have been employed on a steam trawler, in which event his share of the earnings would have been the sum of 280*l.* 11*s.* 5*d.* The assistant-registrar allowed the full amount, which had already been paid to the man by the plaintiffs in the action. The matter ultimately went to the Court of Appeal. Without determining the question of amount, the Court of Appeal decided that the measure of compensation which had been applied was incorrect, and sent the matter back for review. Upon reconsideration, the assistant-registrar has reduced the allowance to 250*l.* From that decision the defendants now appeal, upon the ground of principle that the wrong measure has been applied. Further, it is said that in any event the allowance is excessive. That further ground was always a matter for consideration upon the original taxation, and has been considered again by the assistant-registrar.

The amount on the face of it is startling. It arose from the fact that at the time in question the earning capacity of steam trawlers in the North Sea was such as I suppose had never been known before, and may not be known again. The first question is whether the proper principle has been applied. That is important from the point of view of the practice of the Court, and is a matter of administrative law. The second question is whether the principle has been applied, having regard to the sum allowed. That is a matter at any rate of some consequence to the parties. I will deal first with the larger question. I have to decide what direction the Court of Appeal gave and whether it has been applied. There is a conflict as to what was the direction of the Court of Appeal. Mr. Stranger, for the appellants, based his argument upon the contention that the direction is to be found in the reasons for the judgment pronounced by Younger L.J. in the following passage :—"Little objection, in the bulk of such cases, could, I think, be raised to an allowance for the detention of a necessary seafaring witness if that allowance be based upon a reasonable subsistence payment suitable to a person in his station in life while not exceeding any

loss actually incurred by him by reason of his detention or any real remuneration which, but for that detention, the witness would have earned or of which by reason thereof he may have been deprived." (1) Now that passage is cited as a ruling which shall set up, as a governing factor in deciding the allowance for a witness who is a seafaring man, the costs of a reasonable subsistence for the witness. If that were the result, it would be contrary to the practice of this Court for a long period, and, at any rate, since the time of Dr. Lushington. I have looked at some typical bills of costs set out in the text-books, and it is quite clear—as I am advised in the Registry and as appears from the judgment in the Court of Appeal—that the limitation of the allowance for a seafaring witness to the costs of his reasonable subsistence is not the measure which has been applied. But if the Court of Appeal directs that that is the measure it is for every judge sitting in this Court to see that measure applied. I have merely to see whether that is the direction of the Court of Appeal. The judgment was expressed in two reasoned statements—the first by the Master of the Rolls, in which Warrington L.J. concurred, and the second by Younger L.J. I have considered both judgments. This was the direction which the Master of the Rolls gave with the concurrence of Warrington L.J.: "I think the only direction that can be given is that the assistant-registrar must award the reasonable compensation to a person of the class of the witness, taking into account all the circumstances and considering the wages which the witness was earning about the time of detention not as an absolute measure, but an important indication and guide of what is fair. The fact that all persons are under an obligation to give evidence when called upon should also not be ignored." (2) That obviously is not the measure upon which Mr. Stranger relied. His argument was founded upon the passage referred to in the judgment of Younger L.J., which is a statement of reasons for the judgment given by one member of the Court, and—if it were converted into a set rule—is not consistent with the reasons

(1) [1921] P. 255, 273. (2) Ibid. 261.

1921

THE IBIS VI. (No. 2).

The President.

given by Lord Sterndale with the concurrence of Warrington L.J. What has to be followed here is the judgment of the Court.

Having now ascertained what was the judgment, I see what is the true measure; and I have to consider whether, upon the answers made by the assistant-registrar to the objections, he in fact did apply the true measure. I am satisfied he did. Applying it, he abated the sum originally allowed by 30*l.* Into the accuracy of that application of the rule in point of amount it is not for me to enter, and it is a matter into which I am not competent to enter. The assistant-registrar was the judge of fact in this case. I am satisfied that he has applied his mind to the question of fact with full assistance from the direction of the Court of Appeal.

That being so, this appeal is unfounded, and must be dismissed with costs.

Solicitors for the plaintiffs: *Nicholson, Graham & Jones, for J. R. Gaulter, Fleetwood.*

Solicitors for the defendants: *Downing, Handcock, Middleton & Lewis.*

E. C. M. T.

ADMIRALTY. 1921
Nov. 1, 4.

THE ZELO.

Shipping—Collision—Damage to sunken Vessel—Action by Salvors of wrecked Vessel—Possessory Interest in Wreck—Loss of beneficial Contract—Right to sue—Quantum of Damages.

The plaintiffs contracted to salve a sunken vessel on a "no cure, no pay" basis. In pursuance of the contract they attached their salvage plant to the wreck and incurred considerable expenditure in the salving operations. At a time when, as the plaintiffs alleged, the successful raising of the wreck was assured, it was run into by the defendants' steamship through the negligence of the defendants' servants and irreparably damaged. The plaintiffs claimed damages for the loss of their plant and also in respect of the loss of the beneficial contract due to the damage to the wreck:—

Held, on the facts, that the plaintiffs were in possession of the wreck, and that accordingly they were entitled to recover in respect of the damage thereto; and that between them the plaintiffs and the owners of the wreck (if the latter recovered judgment against the defendants) were entitled to recover the whole value of the wreck. The exact value, which was a question for the registrar, would depend on whether the plaintiffs were right in their contention that the salvage operations would have been successful.

ACTION OF DAMAGE.

The plaintiffs, a salvage company called Maritime Salvors, Ld., claimed to have suffered damage by reason of a collision between a sunken steamship, the *Merkur*, and the steamship *Zelo* belonging to the defendants, the Pelton Steamship Co., Ld.

According to the statement of claim, the *Merkur* on May 9, 1920, was sunk by collision in Barry Roads. By a contract of May 22, 1920, the plaintiffs contracted with Messrs. W. K. Webster & Co., as agents for the underwriters of the *Merkur*, to salve her on a basis of "no cure, no pay," the amount of payment in the event of success to be referred to arbitration. In pursuance of the contract salvage operations were carried on until September 19, 1920, by which time, as the plaintiffs alleged, the successful raising of the *Merkur* was assured. On the evening of September 19, while the *Merkur* was lying

1921

THE ZELO.

marked and lighted by means of a buoy showing a green flashing light, she was run into by the *Zelo*, whereby valuable material belonging to the plaintiffs was lost and the successful salvage of the *Merkur* was rendered impossible. The plaintiffs alleged that at all material times the *Merkur* was in their possession and under their control.

By their defence the defendants denied that the collision was due to the negligent navigation of the *Zelo* and alleged that it was solely due to the defective manner in which the wreck of the *Merkur* was lighted. They denied that the *Merkur* was in the possession or under the control of the plaintiffs; and if the plaintiffs had suffered damage by reason of the successful salvage of the *Merkur* being rendered impossible, which was denied, the defendants contended that the plaintiffs were not entitled to recover damages from the defendants in respect thereof. In the alternative, by way of counterclaim the defendants said that if the *Merkur* was in the possession and under the control of the plaintiffs, they (the defendants) had suffered damage by reason of the collision which was caused by the negligent way in which the wreck was lighted by the plaintiffs or their servants in that the plaintiffs failed to mark the position of the wreck with a light of sufficient visibility.

On November 1, Hill J., who was assisted by nautical assessors, gave judgment on the issue of fact as to whether the collision was caused by negligence in the navigation of the *Zelo*.

His Lordship said that the Trinity House, under the powers and duties of s. 531 of the Merchant Shipping Act, 1894, had marked the wreck and had placed a gas buoy showing a green flashing light. The defendants' case was that on the night in question the light could only be seen a short distance away, but in his Lordship's opinion its visibility was such that it could have been seen in ample time to avoid the wreck. That amounted to a finding of negligence against the defendants, and, as some property of the plaintiffs which was attached to the wreck admittedly had been damaged, the plaintiffs were entitled to judgment. The question

whether the plaintiffs were entitled to recover damages in respect of the damage to the *Merkur* was reserved for further argument.

Butler Aspinall K.C. and *Noad* for the plaintiffs. This is a case of bailment ; the owners of the *Merkur* had not abandoned their rights of ownership, but the wreck of the vessel was in the sole possession and control of the plaintiffs and they have a right to sue in respect of the damage to the wreck itself : *The Okehampton* (1); see also *The Winkfield*. (2) The case is distinguishable from *Remorquage à Hélice* v. *Bennetts* (3) as the plaintiffs in that case, who sought to recover for the loss of a towage contract, had not got possession of the vessel towed. Even if the plaintiffs were wrongly in possession the defendants as wrongdoers are estopped from questioning the right of the injured party to sue; they cannot set up the jus tertii: *Jeffries* v. *G. W. Rly. Co.* (4)

Laing K.C. and *Balloch* for the defendants. The possession of the wreck was still in the underwriters or the Trinity House. The plaintiffs were not in supreme control ; the Trinity House at any time could have taken possession under its statutory powers and blown up the wreck, and the mere fact that the plaintiffs were employed as contractors does not amount to an abandonment or to a transfer of possession : see *The Douglas* (5); *The Utopia* (6); *The Snark*. (7) The plaintiffs therefore were not in the position of bailees and the case falls within the principle laid down in *Remorquage à Hélice* v. *Bennetts* (3) and *Cattle* v. *Stockton Waterworks Co.* (8) Even if the plaintiffs were in the position of bailees that does not entitle them to recover damages for the possible loss of a beneficial contract, they can only recover in respect of the actual damage to the hull and the plant which they had on board.

[HILL J. referred to *The Argentino*. (9)]

(1) [1913] P. 173.
(2) [1902] P. 42.
(3) [1911] 1 K. B. 243.
(4) (1856) 5 E. & B. 802.
(5) (1882) 7 P. D. 151.
(6) [1893] A. C. 492.
(7) [1900] P. 105.
(8) (1875) L. R. 10 Q. B. 453.
(9) (1888) 13 P. D. 191.

1921

THE ZELO.

That was a claim for damages for loss of the use of a chattel and not a claim for the problematical loss of a beneficial contract. If bailees, the plaintiffs' rights are limited to any rights the owners would have had.

Darby held a watching brief for the Trinity House.

Cur. adv. vult.

Nov. 4. HILL J. read the following judgment: The question which remains for decision is whether the plaintiffs are entitled to sue for the damage to the *Merkur*. I decide that question in the plaintiffs' favour, because I find that at the time of the damage done to the *Merkur* the plaintiffs were in possession of the *Merkur*. If so, their claim is not a claim merely for the loss of contractual advantages, which have been defeated by the damage to the *Merkur*. It is a claim for damage to the *Merkur*. It is not a case within the principle of *Cattle* v. *Stockton Waterworks Co.* (1) and *Remorquage à Hélice* v. *Bennetts*. (2) It is a case within the principle of *The Okehampton* (3) and *The Winkfield*. (4)

It was contended that possession was not in the plaintiffs, but in the Trinity House or in the owners or underwriters, and that the plaintiffs were mere licensees who were permitted to do work upon the *Merkur*. It was not proved that the Trinity House ever took possession. They might have done so under their powers by ss. 530 and 531 of the Merchant Shipping Act, 1894. They did exercise their powers to light the wreck, but it was not shown that they had yet exercised their powers to take possession. But if the Trinity House did take possession, then by virtue of the agreement between the Trinity House and the plaintiffs of June 4, 1920, I am of opinion that the Trinity House transferred the possession to the plaintiffs, reserving to themselves the power under certain conditions to retake possession. If the Trinity House did not take possession then possession remained in the owners, or had been transferred by them to the underwriters. It was not proved

(1) (1875) L. R. 10 Q. B. 453.
(2) [1911] 1 K. B. 243.
(3) [1913] P. 173.
(4) [1902] P. 42.

whether the underwriters had received or had accepted notice of abandonment, but both underwriters and owners had representatives standing by at Cardiff, and whichever were concerned they were either party to or consenting to the contract made with the plaintiffs by Messrs. Webster.

In pursuance of that contract the plaintiffs, as the underwriters and owners intended should be done, and as they knew was being done, dealt with the *Merkur* in such a way as they thought fit. They fixed in her their apparatus, patched holes, opened holes, and worked at their own discretion under water by their divers, and also at suitable states of the tide above water upon such portions as were exposed. For the greater part of the time the plaintiffs' salvage steamer was stationed on the spot, leaving it only when she was driven into shelter by stress of weather. The plaintiffs, and the plaintiffs alone, were exercising complete control over the *Merkur*. I hold they were in possession. They were none the less in possession because on September 19, at the time of collision, there was no salvage steamer and no servant of the plaintiffs actually on the spot, the salvage steamer having had to go into Barry because of bad weather on the 18th, a Saturday. She did not return until the Monday morning, after the collision. Finding possession in the plaintiffs, I hold that they were entitled to maintain an action for damages arising from damage to the *Merkur*. It is said that no claim in respect of damage to the *Merkur* is alleged in the statement of claim, and that apart from damage to the plaintiffs' plant the only claim alleged is for loss of the benefit of the salvage contract. I do not agree. The allegation is that the *Zelo* came into collision with the *Merkur*, rendering the successful salvage of the *Merkur* impossible, and that the *Merkur* was in possession of the plaintiffs. It might have been more clearly expressed; but that means that the *Zelo* came into collision with the *Merkur* and caused her to become a total loss. Insert the words "damaging the *Merkur*" and the allegation is clear of ambiguity. I gave leave to the plaintiffs so to amend, but I do not think that it is strictly necessary.

1921

THE ZELO.

HILL J.

I was informed that the owners of the *Merkur* have also brought an action. Of course, care will have to be taken that the defendants are not made to pay twice over for the same damage, but between them the plaintiffs and the owners (if they recover judgment) will be entitled to recover the value of the *Merkur* as on September 19. Whether it had any value, and, if so, what the value was, will depend on whether the plaintiffs are right in saying that the salvage operations would have been successful, and, if they are right in that contention, then upon an estimate of the expenses after September 19, and an estimate of the salved value and so forth. I am not making an exhaustive statement of all the matters that will have to be taken into consideration. That will involve a difficult inquiry for the registrar, and when it is concluded, if a figure of value is arrived at, another difficult question as to what would have been the relative interests therein of the plaintiffs, on the one hand, and the owners or underwriters, on the other, arises under the "no cure, no pay" contract, under which, failing agreement, the remuneration is to be settled by arbitration. Between them the plaintiffs and owners or underwriters will be entitled to the whole value, whatever it is, and the plaintiffs, therefore, in my view, are entitled in this action to recover their proportion, when it is determined, of the whole value.

I therefore give judgment for the plaintiffs on the claim for damages, including damages for damage to the *Merkur*, and also judgment for them on the counterclaim, with costs.

Solicitors for the plaintiffs: *Constant & Constant.*

Solicitors for the defendants: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

Solicitors for the Trinity House: *Sandilands & Co.*

E. C. M. T.

[IN THE COURT OF APPEAL AND IN THE DIVORCE DIVISION.] 1921
July 25, 29.
C. A.
Oct. 17, 24.

BRAILEY *v.* BRAILEY.

Practice—Separation Deed—Usual Covenants—Antecedent Debts.

In this case the parties had agreed to execute a separation deed containing the usual clauses, to be settled in case of difference by a named counsel. Counsel settled a deed containing a covenant by the wife to keep the husband indemnified against all debts and liabilities heretofore or hereafter incurred by the wife. The wife took out a summons to strike out the words "heretofore or":—

Held (affirming the decision of Sir Henry Duke P.) that a covenant by the wife to indemnify the husband against antecedent debts was not a usual covenant and not within the powers of the counsel as referee to insert, and the words objected to must be struck out.

In this case the wife filed a petition for judicial separation. The petition came on for hearing on November 25, 1919, and the suit was then compromised on the following terms: "1. All charges of cruelty to be withdrawn. 2. The cause to go into reserve list pending preparation and execution of deed of separation which the parties are to execute containing the usual clauses. 3. Mr. R. V. Le Bas in case of difference to settle deed of separation containing the usual clauses and the following:—4. The respondent to pay the petitioner 350*l.* (three hundred and fifty pounds) per annum from the 29th November, 1919, monthly in advance during joint lives less income tax not exceeding 3*s.* in the £ he paying any balance in excess. 5. The respondent to pay petitioner's costs. 6. These terms to be filed and made a rule of Court."

The terms were made a rule of Court.

Mr. Le Bas settled a draft containing (inter alia) the following clauses:—

Clause 6: "The wife her heirs executors and administrators shall at all times hereafter keep indemnified the husband his heirs executors and administrators from all debts and liabilities heretofore or hereafter contracted or incurred by the wife and from all actions proceedings costs damages

1921

BRAILEY v. BRAILEY.

or expenses claims and demands whatsoever in respect of such debts and liabilities or any of them."

Clause 7: "If the husband shall at any time hereafter be obliged to pay any sum or sums of money for or on account of any debt or liability heretofore or hereafter contracted or incurred by the wife then and in any such case the husband may deduct and retain out of the said annuity the amount which he shall have so paid in respect of such debt or liability together with all costs and expenses which he shall have paid or incurred on account thereof but so that this present provision shall not in anywise render the husband liable to the payment of any of the debts or liabilities of the wife or prejudice his rights or remedies under the covenant of indemnity hereinbefore contained."

Clause 9: "The husband shall pay the wife's costs."

The wife's advisers objected to the extension of her covenant to liabilities heretofore incurred as not being a "usual clause"; and after a long correspondence the wife took out this summons before the judge calling upon the respondent to show cause why the words "heretofore or" should not be struck out from the deed. The time for payment of the annuity had commenced and some payments had been made by the husband.

The case was adjourned into Court and argued on July 25, 1921.

Bayford K.C. and *C. L. Beddington* for the summons. The usual practice is that a wife or her trustees should indemnify her husband against liabilities incurred after the separation, not against liabilities incurred before. The counsel had no power to introduce the indemnity against liabilities incurred "heretofore."

Willoughby Williams for the respondent. The whole question was referred to counsel and he has decided the matter.

It is not unusual to insert such a covenant in a separation deed. It occurred in *Summers* v. *Ball* (1) and *Wilson* v.

(1) (1841) 8 M. & W. 596.

Wilson (1), and is given in the books of precedents—e.g., Key and Elphinstone, 10th ed., vol. ii., p. 551.

Cur. adv. vult.

July 29. SIR HENRY DUKE P. [after stating the facts proceeded:] Now there has been part performance by payment of the annuity, and the agreement will have to be carried out; and the question has arisen how is the Court to secure the performance of the agreed terms. The question what are "usual clauses" in such a deed was discussed before the referee appointed to settle it, and the question does not seem to have been settled to the satisfaction of either party. The learned referee has included in the draft deed a covenant on the part of the wife to indemnify the husband against "all debts and liabilities heretofore or hereafter" contracted by the wife. That is now attacked as not being a usual covenant.

It is clear that both parties must sooner or later execute a deed. The case came before me on a summons by the wife asking that the words "heretofore or" should be struck out from the clauses which I have read. Objections were taken both to the form and to the substance of the proceeding. One objection taken on the part of the husband was that the reference was a submission to arbitration, and that the deed as settled by the referee was an award and that the time for appealing from the award was expired. I treated the application as one to set aside an award pro tanto, and held that I had power to extend the time for that purpose; and I accordingly now propose to treat the summons as a summons amended for that object.

The substantial question is whether a covenant to indemnify against debts "heretofore" contracted can be called a usual covenant. I inquired what materials the referee had for deciding the question. It does not appear that he had before him any evidence of conveyancers as to whether the covenant in question is a usual one. A case was cited

(1) (1854) 5 H. L. C. 40.

1921

BRAILEY v. BRAILEY.

The President.

before him, and also before me, of *Summers* v. *Ball* (1), in which a deed containing a similar covenant came before the Court, but the decision does not appear to affect the present question. Books of precedents were referred to, such as Key and Elphinstone, 10th ed., vol. ii., p. 551. On examining these I find in one a precedent for an annuity limited during chastity; but it has long since been decided that a covenant to pay an annuity subject to this limitation is not a usual covenant. I dismiss that precedent from consideration. In other precedents I find numerous provisions obviously only intended to meet special cases. I am satisfied that in no case did the editors of these works intend to vouch them as containing "usual" covenants. There appear to have been no other authorities cited to the referee. I pass accordingly to the light of authority.

In *Wilson* v. *Wilson* (2) the only point decided was that an obvious mistake in the deed, which made the trustees covenant to indemnify the husband against his own debts, instead of against those of his wife's, could be corrected.

On the question whether it is usual to do more than indemnify against future debts, I refer to Macqueen on Husband and Wife, 4th ed., p. 415; and in considering what the usual covenant for indemnity amounts to, I find it stated in Halsbury's Laws of England (Husband and Wife), Part IX., vol. xvi., p. 445, in a portion of that work edited by Sir H. Bargrave Deane (who was for many years a judge of this division of the High Court), that the usual clause on this point merely contemplates an indemnity against debts contracted by the wife during the separation. Having regard to these authorities I feel strongly that such a covenant as that appearing in the draft deed is not usual. I thought when the matter was before me in chambers that the covenant was incongruous, and I have now arrived at the conclusion that it is not usual.

It is contended on behalf of the husband that the petitioner left the whole matter to the referee, but it is clear that such an argument cannot go beyond the usual covenants. There

(1) (1841) 8 M. & W. 596. (2) (1854) 5 H. L. C. 40.

are two courses open to me. I might set aside the award as not being within the scope of the reference; but the covenants of this deed are separable, and it is a principle of long standing that the incompetent part of an award may be set aside without interfering with the rest of it. I have also power to remit the reference to the arbitrator. But under all the circumstances I think that it is my duty to confirm the award except as to the particular covenant, and to set aside that part of the deed on the ground that the agreement did not permit its imposition upon the parties. I allow the application to vary the award.

J. R. B.

The husband appealed. The appeal was heard on October 17, 24, 1921.

Murphy K.C. and *Willoughby Williams* for the husband. In order to give an interpretation to the word "usual" regard must be had to all the circumstances of the case. In Halsbury's Laws of England, vol. xvi., p. 444, § 909, it is stated: "The term 'usual' in an agreement entered into for the execution of a separation deed, with the usual covenants and clauses, is construed with reference to the surrounding circumstances, and to the practice and custom of conveyancers in such cases" and in support of that statement *Hart* v. *Hart* (1) is cited. In the present case it is submitted that the clause proposed to be inserted was "usual" having regard to the circumstances. The parties had separated some time before the suit was commenced, and the husband had been making his wife an allowance. It was necessary therefore that he should be protected against her debts incurred up to the time the terms of settlement were agreed upon. Having regard to the fact that the clause proposed is one that is adopted in certain well-known books of precedents it cannot be said that it is unusual: see Key and Elphinstone's Precedents in Conveyancing, 10th ed., vol. ii., p. 558, clause 15; Bythewood and Jarman's

(1) (1881) 18 Ch. D. 670, 687.

C. A. 1921

BRAILEY v. BRAILEY.

Precedents in Conveyancing, 4th ed., vol. vi., p. 116, clause 7; Bowstead's Forms and Precedents, vol. ii., p. 1330.

[WARRINGTON L.J. referred to Davidson's Precedents in Conveyancing, 3rd ed., vol. v., Part II., precedent 106, clause 7.

YOUNGER L.J. referred to Prideaux's Precedents in Conveyancing, 21st ed., vol. ii., p. 754, and Vaizey on Settlements, p. 1447.]

If this was, as it is submitted it was, a submission to arbitration, and if the clause was one which might or might not be usual according to the circumstances of the case, the matter whether this particular clause was in the circumstances of this case usual was one which was left to Mr. Le Bas to decide and his decision cannot be interfered with.

[They also referred to *Wilson* v. *Wilson* (1); *Summers* v. *Ball* (2); *Gibbs* v. *Harding* (3); *Lancaster* v. *Lancaster* (4); Davidson Precedents in Conveyancing, 3rd ed., vol. v., Part II., p. 669n.]

Bayford K.C. and *C. L. Beddington* for the wife were not called upon.

LORD STERNDALE M.R. stated the facts and continued: The objection taken to clause 6 of the draft deed which provides for an indemnity to the husband against the wife's debts and liabilities "heretofore,"—that is to say, at any time before the separation contracted or incurred, is that it is not a usual covenant. It is contended that the usual covenant is confined to debts after the date of the separation and the date from which the annuity becomes due, because the annuity is the provision that is made for the wife in consideration of which she gives the indemnity. That is the objection that was taken, and the learned President upheld the objection.

The appeal is brought to this Court. No objection either below or here was taken to the jurisdiction of the learned

(1) 5 H. L. C. 40.
(2) 8 M. & W. 596.
(3) (1870) L. R. 5 Ch. 336.
(4) [1896] P. 118.

President or of this Court or to the procedure by which the question was raised. It is therefore not necessary to consider whether this was the right procedure, or whether the learned President had jurisdiction to make the order. I do not suggest that he had or had not. The question has not been raised before us, and I only wish not to be taken as deciding anything upon a point which was not raised before us. I deal with the matter as it has been argued before us, assuming the jurisdiction and the procedure to be correct. I ought to limit what I say as to procedure to this extent: that an objection was taken before the learned President that the clause in the terms of settlement, that Mr. Le Bas was in case of difference to settle the deed of separation, was a submission to arbitration under the Arbitration Act, 1889. I do not know what opinion the learned President formed upon that point, nor do I think it necessary to form any myself, for this reason. The learned President said that if that were a submission to arbitration it was quite competent for him to extend the time for setting the award aside, and that he should do so, in order to get rid of all technicalities which might be said to prevent him entertaining an application to set it aside on the ground that the time for appealing had expired or anything of that sort. That, I think, was the correct way to treat the matter, whether it was a submission to arbitration or not. I also wish to say that whether it is a submission to arbitration or not, the authority given to Mr. Le Bas was a limited one; it was not to settle what were usual clauses, but only to settle a deed containing the usual clauses, and that he had therefore no jurisdiction to insert in the deed anything that was not a usual clause in a deed of separation, and that if he did so the parties were not bound to execute that deed because their only agreement was to execute a deed containing the usual clauses.

The question therefore with which we have to deal is whether or not a clause which contains an indemnity against debts and liabilities incurred previous to the separation and the beginning of the annual payments is a usual clause in a deed of separation. A good deal of argument has been addressed

C. A. 1921

BRAILEY v. BRAILEY.

Lord Sterndale M.R.

to us to show that the circumstances of this case are peculiar in this respect, that there had been in fact a separation; that is to say, the parties had been living separate before this suit was commenced and before the agreement for the deed, and it was argued that having regard to that fact what was an appropriate and proper clause in those circumstances was a usual clause within the meaning of the terms of settlement. I do not agree with that argument. I think if it could be shown, and it certainly to my mind has not been shown, that it is usual where such circumstances exist to insert a clause such as was inserted in this case, then it would be a different matter, because then it might be said to be a usual clause. I do not say whether it would be right or not, but nothing of the kind has been shown, and I think the usual clauses here must be read as the usual clauses in normal circumstances.

Now was this such a clause? We have had a good many text-books cited to us, and undoubtedly there does appear in Key and Elphinstone's Precedents, 10th ed., vol. ii., p. 558, a book of great authority, a precedent of a deed of separation which does contain such a clause as this. I think that is the only one which does, and that precedent contains a considerable number of clauses which might or might not be inserted according to the particular circumstances of the case for which the deed was required. Therefore I do not think even that is an authority that this is a usual clause. On the contrary, I think that the whole trend of authority so far as there is authority is to show that it is not a usual clause.

The inception of the matter was that these deeds were upheld in the first instance on the ground that the payment of the annuity or the provision for the maintenance of the wife was the consideration for the indemnity that was given. That would naturally lead one to suppose that the provision for maintenance and the indemnity would begin at the same date, and in all the books of authority to which we have been referred, except Key and Elphinstone, which I have mentioned, that is carried out by the form of the deed. It

was stated that that was the ordinary form of deed in the case of *Wilson* v. *Wilson* (1) mentioned as a precedent, although no doubt the point was not directly under the consideration of the Court at that time. It is also so stated in several other works to which we have been referred, and I know of nothing whatever to the contrary except the one precedent in Key and Elphinstone.

In those circumstances I do not see my way to differ from the learned President that the words "heretofore or" are not part of the usual clause in a separation deed and that they ought to be expunged.

Dealing with it as a matter under the arbitration Act, if it were so, he has said that he could set aside that part of the award if it were an award which was outside the arbitrator's jurisdiction without setting aside the rest, and there is authority that that can be done where one can be separated from the other. Here the one can be separated from the other, and therefore I think he is right in saying that.

With regard to his expunging the words I suppose what that comes to is this. If the parties do not execute the deed then there would be proceedings before him to compel them to do so, and in expunging, as he says, these words, I think what he means is this: "I shall not compel the parties to execute a deed with those words in it"; and that is, I suppose, the foundation of the jurisdiction of the learned President.

I think the learned President was right, and the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The question is whether the learned President was right in treating the draft prepared by Mr. Le Bas so far as the two clauses are concerned which have been read by the Master of the Rolls as a proper draft within the meaning of the terms of settlement referring the settlement of that draft to Mr. Le Bas.

I desire to add nothing to what was said by the Master of

(1) 5 H. L. C. 40.

C. A. 1921

BRAILEY v. BRAILEY.

Warrington L.J.

the Rolls on the point as to the jurisdiction of the learned President to make the order he did. The point was not raised before us and, like the Master of the Rolls, I desire to express no opinion upon it. I think that what the learned President has done, or rather the way in which he arrived at what he has done was that which has been suggested just now by the Master of the Rolls—namely, that if the deed stood as settled by Mr. Le Bas he would not have considered himself justified in enforcing the execution thereof as not being in accordance with the terms of settlement.

Putting aside those matters, the real question we have to determine is whether the draft as settled by Mr. Le Bas was a deed containing the usual clauses. The question arises between husband and wife who had agreed to a separation, and the terms on which the separation was to take effect were embodied in a memorandum and were filed and made a rule of Court. The only material terms for the purpose of construction are the second and third. [His Lordship read clauses 2 and 3 of the terms of settlement and continued :] Then there are special clauses, first with regard to payment of an annuity by the husband, and secondly as to payment by the husband of the wife's costs. What then is meant by "containing the usual clauses" in such a context as this ? In my opinion the words "usual clauses" mean the clauses which would be inserted in a deed of separation in the absence of special circumstances, that is to say, under normal conditions. Two parties agree to live separate, the husband is to pay the wife an annuity, and the wife is to indemnify the husband against debts. Under such circumstances what is the usual form of the clause of indemnity? We have been referred to a great many authorities and the conclusion I have come to is that the usual form is that which has been adopted by the learned President as the usual form, that is to say, a clause providing for the indemnity of the husband from all debts and liabilities hereafter contracted, that is contracted after the commencement of the separation. I think that certainly appears to have been Lord Cranworth's idea of what is the usual clause from the speech which he

delivered in *Wilson* v. *Wilson* (1) and I think is the view expressed by Lord Halsbury in The Laws of England, in the article for which I understand Bargrave Deane J. was responsible. But the strongest authority to my mind on that point is the precedent in Davidson's Precedents, 3rd ed., vol. v., Part II., precedent 106; and it is valuable for this reason. It is a precedent of an ordinary separation with no special provisions at all except with regard to the custody of the children. There are no special circumstances, no property of the wife, no property of the husband to be dealt with, or anything of that sort. It is the ordinary deed containing an agreement to live separate, with a personal covenant on the part of the husband for provision for the wife. Now that covenant is followed by this clause (clause 7). I will read it quite shortly: The wife shall out of the provision made for her by the said indenture settlement hereinbefore referred to and by these presents respectively or otherwise, provide her own maintenance and the maintenance of the children, "and shall pay and discharge all the debts, engagements and liabilities which she may incur or enter into in respect of the matters aforesaid or any other matters, and shall indemnify the [husband] his heirs and administrators therefrom and from all actions proceedings costs damages expenses claims demands and liabilities on account thereof." That is to say, that clause expresses this. The husband agrees to pay for the maintenance of the wife and children who are to remain in the wife's custody, and the wife is to discharge the costs of that maintenance out of the allowance so made to her, and indemnify the husband accordingly.

Now that is, certainly, a reasonable provision. While the husband is maintaining the wife by means of this annuity the wife is not to render the husband liable for any further debts or liabilities. They had agreed to a sufficient sum for maintenance, and there the matter was to stop.

It is quite true that in Key and Elphinstone, 10th ed., vol. ii., p. 558, and in Bythewood and Jarman, 4th ed.,

(1) 5 H. L. C. 40.

C. A. 1921

BRAILEY v. BRAILEY.

Warrington L.J.

vol. vi., p. 116, which seems to follow in the footsteps of Key and Elphinstone, the indemnity clause there found does extend to debts heretofore or hereafter contracted. But when you look at the actual volume of Key and Elphinstone you find that the chief characteristic in which it differs from Davidson's Conveyancing is that what is there inserted is a series of different clauses to be used in the preparation of a separation deed which may or may not be agreed to. You do not find as you do in Davidson a precedent of an actual deed as prepared for execution. You get a deed in which there are a number of clauses, some enclosed in square brackets (thereby indicating that they are intended to be used in special circumstances), and others not. But it is impossible to say in a precedent of that kind whether such a clause as the one in question is inserted as appropriate to an ordinary case or as appropriate to one where there are special circumstances.

One argument here used was that "usual clauses" in these terms of settlement means clauses which would be usual under the special circumstances of this case. I do not think it means that; I think it means, as I have already said, the clauses which are usual in normal circumstances—that is to say, in a case where there is, as is usual, a provision for an annuity, and where in other respects there is nothing special. Under normal circumstances I am satisfied that the usual provision is that the indemnity and the annuity should be co-extensive so far as time is concerned.

The result is, in my opinion, that the appeal fails and must be dismissed.

YOUNGER L.J. I am of the same opinion, and after what has fallen from my Lords with reference to the technicalities of the case, with which, if I may say so, I respectfully agree, I shall confine what I have to say to the substance of the matter on the footing that adjudication upon it is open to us. And the substance of the matter is this. In a separation deed to be prepared in pursuance of an agreement come to in Court between husband and wife in a suit for judicial

separation are the two clauses, Nos. 5 and 6 in the draft before us, usual clauses in view of the arrangement come to between the parties in Court. The only term of that arrangement to which at the moment it seems necessary to refer is clause 4, under which the petitioner, the wife, was to be paid by the respondent, her husband, a sum of 350*l.* a year as from November 29, 1919. In those circumstances the question arises whether a usual clause in a deed of separation to contain that express provision would impose upon the wife an obligation to indemnify her husband not only against debts which she may incur while this separation allowance is being paid, but also in respect of debts that had been incurred by her prior to its becoming due. Now, apart from all authority, my view would be that an indemnity to the husband against pre-separation debts of the wife is not such an indemnity as would presumably be within the contemplation of the parties in fixing the terms of a deed of separation when there had been silence during the negotiation with respect to it. I should have thought myself that apart from special circumstances any liability on the part of the husband at the date of separation in relation to any pre-existing debt of the wife was not intended in any way to be affected by such a deed, and that any provision for indemnity contained in the deed would be referable to and made contemporaneous with the provision thereby supplied by the husband for the wife's future maintenance. And I find on reference to authority that the indemnity common in such cases is limited by reference to that very circumstance. I find, for instance, in Mr. Vaizey's book on Settlements in vol. ii., p. 1447, the statement that a valuable consideration for the husband's stipulations in a separation deed is usually afforded by the covenant of a trustee for the wife to indemnify him against her debts. Mr. Vaizey refers in support of that statement to two authorities, one of which is *Stephens* v. *Olive* (1) and the other is *Worrall* v. *Jacob* (2), and it will be found that in both of them the covenant there given by the trustee was a covenant to indemnify the husband

(1) (1786) 2 Bro. C. C. 90. (2) (1817) 3 Mer. 256.

C. A. 1921

BRAILEY v. BRAILEY.

Younger L.J.

against what I may call the post-separation debts of the wife, that is to say, debts incurred during the period when she is being maintained by the moneys provided by the husband under the covenant on his part contained in the deed and no others. And all that enforces and emphasises the completeness of the statement made by Lord Cranworth in *Wilson* v. *Wilson* (1), that a covenant in that form and so limited is in accord with the constant course of practice in such cases.

But Mr. Murphy has succeeded in finding two precedents in which the covenant in question extended to what I may call the pre-separation debts of the wife. In neither of those precedents however is any intelligible or other reason given for so extending the covenant, and on the other hand there is to be found in Davidson's Precedents, in the clause which has just been read by the Lord Justice, not only a covenant which limits the indemnity to the post-separation debts of the wife, but by its very form gives an intelligible and satisfactory reason for so limiting it. I find also in Prideaux's Precedents in Conveyancing, 21st ed., that the covenant is also limited in the same way. Accordingly not only is it as it seems to me in accordance with what one would regard as appropriate that the covenant should be so limited, but as appears from conveyancing precedents of the highest authority and from the statement of a Lord Chancellor in the House of Lords the practice so to limit it is both constant and usual. Accordingly I reach the conclusion that, in the absence of any special circumstances, there is no ground for inserting in this particular deed any indemnity against the pre-separation debts of the wife.

But it was suggested by Mr. Willoughby Williams, as also by Mr. Murphy, that there is one further provision in these heads of arrangement which may affect the position — namely, clause 5—which provides, tout court, that the respondent, that is to say the husband, is to pay the petitioner's costs. Upon that, the argument, as I understand it, is this. If the deed stands, it is said, in the form to which

(1) 5 H. L. C. 40.

it has been altered by the learned President, and the indemnity by the wife is limited to her post-separation debts, then, on its true construction the deed will leave the husband exposed to a liability for all her pre-separation costs, whether as between party and party or as between solicitor and client, a result which it is suggested is in direct conflict with clause 5, which it is averred on construction confines the liability of the husband in respect of his wife's costs to her costs of the suit and to those costs only as between party and party. Now I confess I was struck with the force of that argument, and if the deed as it has left the President's hands would be open to that construction, the argument would, I think, require careful consideration. But in my opinion the deed as it now stands will not entitle the wife to say that she is indemnified by her husband against any costs of her own other than those which on its true construction are included in clause 5 of the terms, because by clause 8 of the deed the draftsman risking nothing has inserted a provision as to costs identical in terms with the provision of clause 5 with the result, as it appears to me, that on construction of the whole deed, whatever may be the husband's liability in respect of any other pre-separation debts of the wife his liability as to her costs is limited to those which on its true construction are payable by him under clause 8 of the deed which are those undertaken by clause 6 of the terms. Accordingly, costs being so dealt with, no exceptional or special circumstance remains which requires any modification in what is otherwise the usual covenant with reference to indemnity against the debts of the wife.

For these reasons, I think this appeal ought to be dismissed.

LORD STERNDALE M.R. I meant to say in my judgment that the deed should be dated as suggested by Warrington L.J. during the argument, as from November 29, 1919, to which I understand Mr. Bayford assents.

Bayford K.C. I have not the least objection to that. The only thing is, it involves some additional cost with regard to the stamping.

C. A. 1921

BRAILEY v. BRAILEY.

YOUNGER L.J. If you want to avoid any difficulty as to the penalties that can be got over in this way. Put in the body of the deed "or heretofore after the 29th November, 1919." Then you can date the deed as of the day of its actual execution without fear of the consequences.

Bayford K.C. I have not the least objection to that.

Appeal dismissed.

Solicitors for husband: *Quicke & Card, for H. Montague Williams, Brighton.*

Solicitors for wife: *May, Sykes, Sheffield, Powell & Scott Tucker.*

W. L. C.

1921
Nov. 28.

PROBATE.

In the Estate of GEORG VON DEM BUSCHE (DECEASED).

Practice—Administration—Enemy's Property in England—Death during War—Grant of Administration ad colligenda to Public Trustee—Notice of German Will—Full Grant to Public Trustee with the Will annexed—Notice to German Executors and Beneficiaries dispensed with—Practice as to Grants to Controller of Clearing Office—Treaty of Peace Order, 1919, *s.* 1, *sub-s. xvi.—Treaty of Peace of June* 28, 1919, *s. iv., art.* 297.

A German died during the war possessed of property in England, and a grant of administration ad colligenda was made to the Public Trustee, who had collected the assets in England, paid the estate duty and English claims, and had a large surplus in his hands. The Public Trustee had notice of a German will and had been in communication with the executors and beneficiaries, who were German. He now applied for a full grant of administration alleging that the assets were subject to the charge created by the Treaty of Peace of 1919, and the Treaty of Peace Order, 1919, s. 1, sub-s. xvi., which had precedence over the claims under the will.

The Court made a full order in favour of the Public Trustee with the will annexed and dispensed with further notice to the executors and beneficiaries under the German will.

GEORG VON DEM BUSCHE, a German national, died in Germany during the war possessed of shares in English companies of considerable value. On September 5, 1916,

1921

GEORG VON DEM BUSCHE, *In the Estate of.*

letters of administration of his estate were granted to the Public Trustee under s. 73 of the Probate Act, 1857 (20 & 21 Vict. c. 77), limited to collecting and receiving his estate, selling the shares and investing the residue in trust securities until further representation should be made. The Public Trustee realized the shares, paid the estate duty and some other claims and invested the residue. He had issued the usual advertisement, but in answer received only one claim, which he did not admit; the claimant after commencing proceedings in Chancery had abandoned them, and stated that he was proceeding through the clearing office. In May, 1921, the Public Trustee received from the British Consul in Hamburg a certified copy of a German will proved in Germany; the executors and beneficiaries therein named were Germans living in Germany. He produced a notarial translation. He had had some communication with a German lawyer acting for the persons interested under the will, and told him the state of affairs. They had made no application for a grant of administration.

H. Durley Grazebrook for the Public Trustee. All that is possible under the existing Order has been done, and it is expedient that the Public Trustee should have power to deal with the assets in his hands. The property is subject to the charge created by the Treaty of Peace Order, 1919, and, therefore, the German executors and beneficiaries have no interest and there is no reason for giving them notice.

He referred to the Treaty of Peace, 1919, s. iv., art. 297 (*h*) (*i*), and the Treaty of Peace Order, 1919, s. 1, sub-ss. i., ii., xvi. (1)

(1) The Treaty of Peace, 1919, s. iv., art. 297, provides: "(*h*) Except in cases where, by application of paragraph (*f*), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests, wherever situated, carried out, either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows:—

"(1) As regards Powers adopting Section III. and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting

1921

GEORG VON DEM BUSCHE, *In the Estate of.*

SIR HENRY DUKE P. In this case it appears that the property of the deceased in this country has prima facie vested under the Treaty of Versailles. That being so there must be a British administration. The Public Trustee is an independent person able to take out a British administration, and I am asked to appoint him under s. 73 of the Probate Act, 1857. The only question therefore is whether there is any ground for dispensing with what is ordinarily and essentially done in time of peace, that is the giving notice to the next of kin or interested parties. The persons who would, except for the Treaty, have been interested in the assets in this case have been in communication with the Public Trustee, and I think I may take notice of that fact and make the grant.

I revoke the temporary grant for the purpose of making a general grant. And I make a full grant to the Public Trustee with the verified translation of the German will annexed.

I have been asked to give a general direction as to procedure

---

therefrom shall be dealt with as provided in Article 243."

The Treaty of Peace Order, 1919:—

Sect. 1, sub-s. i., established a clearing office.

Sect. 1, sub-s. ii., forbade any person paying, accepting payment of or dealing with any enemy debt except through the Clearing Office.

Sect. 1, sub-s. xvi.: "All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force . . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged—

"(*a*) in the first place, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests, including companies and associations in which they are interested in German territory, or debts owing to them by German nationals, and with payment of any compensation awarded by the Mixed Arbitral Tribunal" (appointed as therein mentioned) . . . . and

"(*b*) secondly, with payment of the amounts due in respect of claims by British nationals with regard to their property, rights and interests in the territories of Austria-Hungary, Bulgaria and Turkey, in so far as those claims are not otherwise satisfied.

"Provided that any particular property rights or interests so charged may at any time, if His Majesty thinks fit, be released from the charge so created."

1921

GEORG VON DEM BUSCHE, *In the Estate of.*

in the cases in which the Public Trustee holds a grant ad colligenda. I cannot do so on the facts before me. If the Public Trustee or the Controller can make an application in a case which raises questions of principle not arising here, it may be possible to frame a direction. In this case, as the order is made under s. 73 of the Probate Act, 1857, it was necessary to proceed by motion. (1)

Solicitors: *George Reader & Co.*

(1) Dec. 19, 1921.

IN THE ESTATE OF MAY, DECEASED.

A German subject died in Frankfort, where he was domiciled, leaving in England one asset only, a debt from an English firm.

T. Bucknill, for the Controller of the Clearing Office, moved for a grant of administration ad colligenda, limited to the debt. He stated that the Controller would not in any case accept a general grant, but asked whether in future cases in which no one except the Controller would be interested the grant ad colligenda might be made under r. 29, N. C. B., without a motion in Court.

SIR HENRY DUKE P. said that in this case the order would be made under s. 73 of the Probate Act, 1857, and he made it with costs. In future cases where it was clear that no one was interested except the Controller, the grant might be made in the Registry under r. 29, N. C. B., and a special direction should be given to that effect.

Solicitor: *Solicitor to the Clearing Office.*

J. R. B.

1921
Nov. 28;
Dec. 5, 12.

DIVORCE.

MONSELL *v.* MONSELL AND CAIN.

Divorce—Practice—Decree Nisi on Husband's Petition—Co-respondent ordered to pay Damages into Court—Damages paid in—Death of Respondent before Decree Absolute—Abatement—Claim for Damages a distinct Cause of Action.

On a husband's petition for dissolution of marriage a decree nisi was made on April 19, 1921, with an order for the co-respondent to pay 600*l.* damages into Court. This sum was paid in, but the respondent died before decree absolute. The husband took out a summons for payment out to him of the damages:—

Held, that the claim for divorce against the wife and the claim for damages against the co-respondent were distinct causes of action, and that the latter had not abated on the death of the respondent.

As a matter of procedure the Court can only deal with the damages after decree absolute.

In this case six months having elapsed since the decree nisi, the petitioner was given liberty to apply in chambers as to the distribution of the damages without further notice to the co-respondent.

Leave was also given for the infant children of the marriage to attend on this application, on an undertaking by their solicitor to be responsible for costs.

On April 19, 1921, the petitioner obtained a decree nisi for divorce against his wife, on the ground of her adultery with the co-respondent. The co-respondent was ordered to pay 600*l.* for damages into Court within fourteen days, and to pay costs; the petitioner was given the custody of his two children. The damages were paid into Court. On July 8, 1921, the respondent died before the decree could be made absolute. On November 11, 1921, the petitioner took out a summons asking that the 600*l.* in Court should be paid out to him and his solicitors; this was adjourned into Court and was argued on November 28.

P. B. Morle for the summons. Before the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), the husband had two distinct remedies in the case of his wife's adultery, (1.) proceedings in the Ecclesiastical Courts against his wife; and (2.) an action for criminal conversation in the common law

Courts against the co-respondent. The paramour was never a party to the proceedings in the Ecclesiastical Courts. The death of the wife put an end to those proceedings, but it had no effect on the action at common law.

In that state of affairs the Matrimonial Causes Act, 1857, was passed. Sect. 33 (1) gave the husband a right to claim damages either in a petition for dissolution of his marriage, or in a separate petition, and provided that the claim for damages should be tried on the same principles and in the same manner as the action for criminal conversation had been tried in the common law Courts.

Under this section the claim for damages was independent of the decree dissolving the marriage. All that was required for an award of damages was a petition, a verdict and an order of the Court. By s. 59 of the same Act the common law action of criminal conversation was abolished. Under that Act decrees for dissolution of marriage were final. The decree nisi was only interposed by s. 7 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144). That section did not refer to petitions for damages only, and there appears to be no reason why on such a petition a final decree should

(1) 20 & 21 Vict. c. 85, s. 33 : "Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the Court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in courts of common law; and all the enactments herein contained with reference to the hearing and decision of petitions to the Court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been given the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife."

1921

MONSELL v. MONSELL AND CAIN.

not be pronounced in the first instance. There is no provision in the Acts of Parliament as to the abatement of suits for dissolution of marriage, and the practice of the Ecclesiastical Courts has reference only to suits to which the paramour was not a party.

It is clear from the authorities that if a co-respondent dies before decree absolute without having paid the damages into Court, no order can be made against his executors, for the cause of action does not survive: *Brydges* v. *Brydges and Wood* (1); but in *Cunningham* v. *Cunningham* (2) it was held that if the co-respondent had paid the damages into Court before his death, the Court could deal with them.

If the King's Proctor intervenes and the decree nisi is rescinded, the award of damages falls to the ground; but that is because the petitioner is shown not to be entitled to any relief.

The claims for damages and dissolution are entirely distinct, and are, for convenience only, usually joined in one petition.

[He also referred to *M.* v. *M. and A.* (3); *Stocker* v. *Stocker, Brice and Patterson* (4); *Maconochie* v. *Maconochie* (5); *Brown* v. *Feeney* (6); *Maxwell* v. *Viscount Wolseley.* (7)]

The two last mentioned cases were decisions of the Court of Appeal in King's Bench actions, showing that where money has been paid into Court in an action which has afterwards abated, the Court retains jurisdiction to deal with the fund.

SIR HENRY DUKE P. directed notice to be given to the co-respondent, and the case adjourned till December 5, to give him an opportunity to appear.

Dec. 5. The co-respondent declined to appear.

H. R. Pigeon, instructed by the solicitors for the respondent,

(1) [1909] P. 187.
(2) (1897) 77 L. T. 405.
(3) (1910) 26 Times L. R. 305.
(4) [1917] P. 264.
(5) [1916] P. 326.
(6) [1906] 1 K. B. 563.
(7) [1907] 1 K. B. 274.

asked leave to represent the children on the question of application of damages.

SIR HENRY DUKE P. said the representatives of the respondent had clearly no locus standi, but gave the solicitors leave to appear for the children on their undertaking to be liable for costs.

SIR HENRY DUKE P. This is a summons in a divorce suit which I adjourned into Court because of the unusual nature of the question which has arisen and the necessary infrequency of the occurrence of such questions. [His Lordship stated the facts of the case as above and proceeded:] The question arises as to the position in point of law of the sum of 600*l.* paid into Court under the order of the Court to await disposal by the Court at the time of the final decree, or after the time of the final decree. Assuming the respondent to have lived, the process would have been this: the decree absolute would probably have been made, failing any intervention by the King's Proctor or by any other person, and at a reasonable period after decree absolute the petitioner would have made his application upon summons that the amount of damages ordered to be paid into Court should now be paid out to him. The sum would have been disposable, because the suit had been disposed of, and the money in Court had become subject to a final Order of the Court under the provisions of the Matrimonial Causes Act, which deals with the award and disposal of damages in a suit for divorce.

The provisions of the law are well known. [His Lordship read the relevant parts of ss. 27 and 33 of the Act of 1857 and proceeded:] This was an application by the petitioner, in the position in which the suit now stands, for payment out of the amount of damages to him, and that payment out obviously is payment out, not under the common practice of the Court where the cause has been disposed of by a final decree, but under some right arising or alleged to arise in the

1921

MONSELL v. MONSELL AND CAIN.

The President.

petitioner by reason of the terms of s. 33 of the Matrimonial Causes Act.

Mr. Morle argued on behalf of the petitioner that by the provisions of s. 33 he had had a right at the time of the filing of this petition to maintain a separate claim against the co-respondent in respect of the adultery of which the co-respondent was found guilty, and that, without any proceeding in respect of divorce, he might have obtained relief by provision of a sum of money in respect of that adultery to be disposed of in the manner directed by the statute. In my judgment, that argument is entirely well founded.

My attention was very properly called to authorities of several classes. It is established by authority that if a co-respondent has died before any judgment has been arrived at against him in a suit for divorce, the claim being a personal claim against him for a wrong of a personal character committed by him, that claim lapses by reason of his death. It has been decided also, and it is well established, that if the alleged adultery out of which the claim is asserted to arise is affected by such incidents that no decree for divorce could be made in respect of it, the claim for damages fails. There are decisions also which deal with the situation in cases where a wrongdoer has died and before the disposal of the suit money has been ordered to be paid into Court, or has been voluntarily paid into Court by the wrongdoer in the course of the proceedings, and the money remains in Court. My attention was called in particular to a case in the Court of Appeal in 1906, and a second case in the Court of Appeal in 1907, in actions for recovery of damages for libel. In those cases it was decided that where, under the Rules of the Supreme Court, money had been paid into Court by the defendant in the cause, in the conditions which arose in those cases; the disposal of the money not being expressly provided for by the rules, there is inherent in the Court the power to deal with that sum of money in such manner as shall be just according to the judgment of the Court. I do not found my decision in this case upon either

of those decisions. They raise a totally different set of considerations, as I conceive, from the considerations which arise in this Court where the Court is dealing with the very exceptional matter of the assessment and award of damages to be dealt with by the Court in manner provided by s. 33 of the Matrimonial Causes Act of 1857.

The position, as it seems to me, is this. The petitioner at the time of filing his petition in this suit had two rights. One was to proceed to sue for dissolution of his marriage on the ground of his wife's adultery. That might have been adultery with this co-respondent, or with one or a number of other people. It happened to be adultery with this co-respondent. Another right which the petitioner had—I do not say his only right but a right which he exercised here—was to maintain a petition in this Court upon which judgment could be had by decree, which would be of the nature of a decree nisi, for the award and payment of a sum of money in damages to be dealt with by the Court in the manner the statute directs. In my judgment, that second legal right of the petitioner is in no way affected in this case by the circumstance that the first legal right has become incapable of further prosecution. That was the view which was taken by my predecessor Lord Mersey in the case of *M.* v. *M. and A.* (1) in the year 1910, and it is the view which is found to underlie several of the cases to which my attention was called. It happened in this case that the petitioner so framed his petition that the right which he asserted against the co-respondent seemed to be on the face of the petition merely a right ancillary to the right which he asserted against the respondent. That is a mere accident of the procedure of the Court. It would be quite good pleading in such a case that the petitioner should make his allegation of his wrongs separately, and that he should make his prayer for relief separately. In some cases the allegation of wrongs is made separately and the prayer for relief follows the separate allegation, and becomes a separate head of claim, and if there had been such a course

(1) 26 Times L. R. 305.

1921

MONSELL v. MONSELL AND CAIN.

The President.

of pleading in this case, I cannot doubt that all that would have resulted in law from the death of the respondent would have been the abatement of the claim against the respondent which could be no longer pursued. All that has to be determined further here is what ought now to be done in respect of this sum of money? Now the sum of money is payable after a decree absolute. It is not payable on interlocutory process. It is not fit to be dealt with by the Court until the cause is in the position in which a decree absolute can be made. This summons can stand over, and when the cause is in that position this summons can be restored to the list of summonses on a convenient day. When the summons is restored to be finally dealt with it will be practicable to consider whether any other representation of the children of the marriage than the representation by their natural guardian, the father, who has their custody, ought to be ordered by the Court, and, in order that that question may be finally and satisfactorily dealt with, I give leave to the applicant, the petitioner, if he is so advised, to file an affidavit in answer to the affidavit which was filed irregularly, but which has been subsequently sanctioned, on behalf of the executors of the deceased respondent.

The result will be that the Court will have before it not only the applicant, the petitioner, the guardian of the children, but a representation of an adverse claim to which the applicant will pay such attention as in his judgment it seems to require, and the Order which will then appear proper to be made for the disposal of this sum of money will be made.

So far as the present matter is concerned, the petitioner has succeeded in substance by obtaining the directions which I have given, and I have only to add to those directions the further direction that the costs of this application be taxed among the petitioner's costs of the petition to be paid by the co-respondent.

Dec. 12. On this day the case was in the paper together with a number of applications to make decrees absolute.

1921

MONSELL v. MONSELL AND CAIN.

SIR HENRY DUKE P. made an order that, six months having elapsed since the decree nisi, the petitioner should be at liberty to apply in chambers as to the disposal of the moneys paid into Court as damages, without any further notice to the co-respondent; and upon that application it could be decided whether the children should be represented.

Solicitors for petitioner: *Boyce & Evans.*
Solicitors for children: *Nye, Moreton & Clowes.*

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.

1921

July 11, 12; *Dec.* 20.

THE COUNTESS.

Shipping—Collision with Dock Gates—Dockowners' Rights of Detention—Statutory Powers of the Mersey Docks and Harbour Board—Limitation of Liability—Priorities—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 94—*Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504—*Merchant Shipping* (*Liability of Shipowners and Others*) *Act,* 1900 (63 & 64 *Vict. c.* 32), *ss.* 1, 3—*Mersey Docks and Harbour Act,* 1912 (2 & 3 *Geo.* 5, *c. xii.*), *s.* 7.

The plaintiffs' steamship *C.*, which was lying in a dock belonging to the defendants, the Mersey Docks and Harbour Board, negligently went ahead instead of astern and crashed through the dock gates into the river, carrying with her a number of craft, some of which were sunk. The *C.* received damage and had to be beached. At a point of time when the *C.* had already been beached the defendants' assistant-marine surveyor certified that she was "in a sinking condition" in the river and in his judgment "an obstruction impediment or danger," or likely so to become, to the safe navigation of the port. The defendants then took charge of the *C.*, and patched, docked and repaired her at a cost of 1048*l.* The damage done to the defendants' docks and works due to the negligence of the plaintiffs' servants amounted to 10,014*l.*

The plaintiffs instituted proceedings for limitation of liability. The defendants claimed the right to detain the *C.* under the Mersey Dock Acts Consolidation Act, 1858, until the plaintiffs had paid the sum of 4468*l.* 4*s.* 9*d.*, the statutory amount of their liability calculated in accordance with the Merchant Shipping Acts, and in addition, under the Mersey Docks and Harbour Act, 1912, the sum of 1048*l.* Thereupon the plaintiffs

C. A.
1921
THE COUNTESS.

issued a writ in detinue, alleging that the detention of the *C.* was wrongful. The defendants set up their alleged statutory powers by way of counterclaim. By an order of the Court of Appeal, the *C.* was released on payment of the sum of 5500*l.* into Court.

By s. 94 of the Mersey Dock Acts Consolidation Act, 1858, a vessel negligently doing damage to any works belonging to the Dock Board may be detained until the amount of the damage, or a deposit for the estimated amount, has been paid. By s. 1 of the Merchant Shipping Act, 1900, a shipowners' right of limitation of liability under the Merchant Shipping Act, 1894, is extended to all cases where without his actual fault or privity any loss or damage is caused to property of any kind, whether on land or water, by reason of the improper navigation of the ship; and by s. 3 the limitation under the Act applies "whether the liability arises at common law or under any general or private Act of Parliament and notwithstanding anything contained in such Act."

By s. 7 of the Mersey Docks and Harbour Act, 1912, the Dock Board may remove the wreck of any vessel or any vessel sunk or stranded within the port which in the judgment (written and duly recorded) of the marine surveyor or his assistant is an obstruction, impediment, or danger to the safe use of the port or likely in his judgment so to become, and the Board may sell the wreck or vessel and out of the proceeds retain the expenses to which they have been put.

Duke P. gave judgment for the plaintiffs in the limitation action and for the defendants in the detinue action on their counterclaim for 1048*l.*; but he held that after the limitation decree s. 94 of the defendants' Act of 1858 did not give them priority over other claimants to the limitation fund, and he ordered the 5500*l.* to be transferred to the credit of the limitation action:—

Held, (*a*) (Lord Sterndale M.R. dissenting) that the effect of the decree of limitation of liability was that the defendants could only detain the deposit until they were paid their rateable proportion of the amount of the plaintiffs' limited liability; but that the limitation sections in the Merchant Shipping Acts did not deprive the defendants of their lien until in fact they received payment, that the order transferring the deposit to the credit of the limitation action was wrong, and that the President's judgment must be varied in that respect (1);

(*b*) (Per Curiam) that the *C.* was a vessel "stranded" and "likely to become an obstruction, impediment or danger to navigation"; that the judgment of the assistant marine surveyor was sufficiently certified to comply with s. 7 of the defendants' Act of 1912; and that accordingly the defendants were entitled to recover the sum of 1048*l.*

Judgment of Duke P. [1921] P. 279 affirmed subject to the above variation.

APPEALS (heard together) from a judgment of Duke P. in an action of detinue and an action of limitation of liability.

The appellants were the Mersey Docks and Harbour

(1) On the judgments of the majority of the Court, Lord Sterndale agreed with the variation.

Board. The respondents (and cross-appellants in the detinue action) were the owners of the steamship *Countess*.

The following statement of the facts in substance is taken from the judgment of Atkin L.J. : On June 5, 1920, at about 11.10 A.M. the *Countess* owing to improper navigation burst open and damaged the gates of the Alfred Dock, Birkenhead, belonging to the Mersey Docks and Harbour Board (hereinafter referred to as the Board). The amount of damage done to the dock gates was estimated by the Board at about 10,000*l*. In consequence of the bursting open of the dock gates and the consequent outrush of water damage was done to a number of barges and other craft, some of which were sunk. The *Countess* was holed and in danger of sinking. She drifted up the river and about 11.50 was beached on Tranmere beach by a privately owned tug, the *Egerton*. The accident and the condition of the *Countess* had been reported to the senior assistant marine surveyor of the Board, and by his orders she was taken higher up on to the beach by two of the Board's tugs. The assistant marine surveyor, after giving these directions, made out a certificate or record with regard to the *Countess*, addressed to the general manager and secretary of the Board, as follows : "Sir, Pursuant to s. 7 of The Mersey Docks and Harbour Act, 1912, I hereby certify that the s.s. the *Countess* is in a sinking condition in the river off the Alfred Dock river entrances, within the Port of Liverpool, and that such vessel is, in my judgment, an obstruction or impediment or danger, or is likely, in my judgment, to become an obstruction, impediment or danger, to the safe and convenient navigation or use of that part of the said Port. I am, Sir, etc." It was signed about 3.30 P.M. and lodged at the office of the Board about 4.40 P.M. On June 7 the Board wrote to the owners that they were detaining the vessel in respect of the damage under s. 94 of their Act of 1858. (1) On June 9 she was

(1) The material passages in s. 94 of the Mersey Dock Acts Consolidation Act, 1858, and s. 7 of the Mersey Docks and Harbour Act, 1912, are summarised in the headnote, and set out fully in the judgment of the Master of the Rolls.

C. A. 1921

THE COUNTESS.

removed by the Board to the Herculaneum Dock for repairs under an arrangement that this should not prejudice the Board's claim under their statutory powers.

At this time the Board were claiming to detain the *Countess*: (1.) Under s. 7 of their Act of 1912 (1) in respect of expenses estimated at about 1048*l.* in and about removing her from being an obstruction to navigation; (2.) under s. 94 of their Act of 1858 for the damage done to their dock gates estimated at about 10,000*l.* On June 5 actions were commenced against the *Countess* by the various barges, etc., for damage caused by her improper navigation, and on June 9 the solicitors for the owners gave the usual undertaking to appear and put in bail. The *Countess* therefore was never in fact arrested and remained in constructive detention by the Board until released under an order of the Court of Appeal, dated July 26, 1920. On June 14, 1920, the owners of the *Countess* commenced an action for limitation of liability in which the defendants were the Board and all others claiming to have sustained damage by the collision with the *Countess*. The Board duly appeared and the statement of claim was delivered on July 5 claiming the usual relief. No defence was delivered, and in due course the President made his decree on March 23, 1921. Meantime the owners, being anxious to obtain release of the vessel, by writ dated July 12, 1920, commenced an action of detinue in respect of the *Countess* against the Board. On July 26, 1920, the Court of Appeal, acting apparently under the powers given by Order L., r. 8, directed that the vessel be released upon the plaintiffs paying into Court the sum of 5500*l.* to be dealt with as provided in the order. The sum of 5500*l.* was made up of 1000*l.* the estimated expenses of removal of obstruction and 4500*l.* representing the total sum for which it was claimed the plaintiffs could limit their liability for damage (the actual sum was 4468*l.*) at 8*l.* a ton. The vessel was in due course released upon the sum mentioned being paid into Court. On November 8, 1920, the plaintiffs delivered their statement of claim in the detinue action and on

(1) See note (1) ante, p. 43.

November 30 the defendants delivered a defence and counterclaim. On March 23, 1921, the President heard the detinue action together with the limitation suit and made the decree from part of which the appeal and cross-appeal were brought.

Leslie Scott K.C., *Greaves-Lord K.C.* and *E. Stewart-Brown* for the appellants. Sect. 94 of the Dock Board's Act of 1858 gives the Board a statutory priority over claimants under the limitation sections in the Merchant Shipping Acts. The effect of those sections is merely to reduce the amount for which the Board can claim; they are entitled to the whole of the limitation fund and until that amount is paid they have a right to retain the deposit. The order of the Court of Appeal ordering the *Countess* to be released on payment of 5500*l.*, although not seriously disputed, really was in excess of jurisdiction. There was no appeal from the order, and it of course stands, but it gave the learned President no jurisdiction to order the transfer of the deposit to the limitation action.

[YOUNGER L.J. It seems to me that it is for the other claimants to the limitation fund, who are represented by Mr. Balloch, and not for the plaintiffs, to contend that the Board have not got priority, and those claimants are not parties to this action.]

They are the parties really interested, and they have been served with a notice of the appeal; they can be heard, therefore, although they are not technically parties to the appeal. Qua those claimants, who have maritime liens for their damage, the Board has priority. In point of time the dock gates were damaged before the various craft were damaged, and the Board's possessory lien given by statute takes precedence of the collision lien. "Rateably" in s. 504 of the Merchant Shipping Act, 1894, does not mean pari passu and ignoring priorities. In drafting the limitation sections in the Merchant Shipping Acts the Legislature has not been concerned with priorities: cf. *The Victoria* (1); "The Act (s. 54 of the Merchant Shipping Act, 1862) interferes with the claimant's

(1) (1888) 13 P. D. 125, 127.

C. A. 1921

THE COUNTESS.

right only by putting a limitation on the amount which they can recover from the shipowner, and there is nothing in the Act to shew that persons who have suffered loss have their rights otherwise altered." Having paid the Board the full amount of their limited liability the plaintiffs will be able to get credit for that in the limitation action, and will not therefore be liable for any more : *Rankine* v. *Raschen.* (1)

[ATKIN L.J. referred to *The Kronprinz Olav.* (2)]

In *Canadian Pacific Ry. Co.* v. *The Steamship Storstad* (3) Lord Sumner said : "It (s. 503) expressly provides for procedure to limit the shipowner's liability, and sets up no principle or rule as to the rights of different classes of claimants apart from such limitation." Whatever the meaning of "rateably" in s. 504 may be, the section has not been applied or extended beyond the matters dealt with in the limitation section in the Act of 1894—namely, damage to vessels, cargo and persons. Sect. 1 of the Merchant Shipping Act, 1900, adds two other matters, damage to property movable or immovable, but s. 504 has not been amended and only applies the provision for rateable distribution to the matters dealt with in s. 503 and not to those dealt with in s. 1 of the Act of 1900.

Before 1900 the right of the Board to detain was paramount, and the effect of s. 3 of the Act of 1900 is merely to cut down the rights given by s. 94 of the Act of 1858 as regards amount ; it does not deal with priorities or rateable proportions. It is clear that s. 504 was not passed in view of dockowners' liens, because similar provisions were contained in the Merchant Shipping Acts prior to 1858 ; the right expressly given by s. 94, therefore, cannot be taken away merely by implication by a statute passed alio intuitu. The defendants are completely protected by their lien and are not claimants under s. 504.

R. A. Wright K.C., *A. T. Miller K.C.* and *Noad* for the respondents. The effect of ss. 1 and 3 of the Merchant Shipping Act, 1900, coupled with ss. 503 and 504 of the Act of

(1) (1877) 4 R. 725. (2) [1921] P. 52.
(3) [1920] A. C. 397, 401.

1894, is to cut down the Board's right of detention under their Act of 1858 to the amount determined by the result of the limitation action; and as soon as the decree of limitation of liability was made the deposit was freed. If the argument for the Board is sound, and the lien still exists, even after a decree of limitation, for the whole amount of the limited amount, the result might be that the shipowners would have to pay the limit of their liability twice over, once in the detinue action to obtain the release of the ship or the deposit and again in the limitation proceedings. This would be contrary to the whole intention of the limitation sections. All the claimants, including the dock Board, merely have the right to prove their claims in the limitation proceedings. It is immaterial, of course, to the respondents whether the whole amount of the limited fund goes to the Board or whether their right to claim a priority is gone and the fund is shared with the owners of the damaged craft; the priorities could be settled in the reference before the registrar, but it is suggested that "rateably" in s. 504 must mean pari passu.

[The arguments on the respondents' cross-appeal in the detinue action from the decision that the Board were entitled to recover the sum of 1048*l.* on the ground that the *Countess* was a vessel "stranded" and "likely to become an obstruction to navigation," and that the judgment of the assistant marine surveyor was sufficiently certified to comply with the provisions of s. 7 of the Mersey Docks and Harbour Act, 1912, were the same as in the Court below.]

Balloch for various owners of craft, defendants in the limitation action. The owners of the craft damaged in consequence of the negligence of the *Countess* could proceed against her owners in rem or in personam, and they in fact commenced an action in rem, and the usual undertaking was given to appear and put in bail to an amount not exceeding the statutory liability ascertained in accordance with the limitation sections of the Merchant Shipping Acts—namely, 4468*l.* 4*s.* 9*d.* These claimants are entitled to their rateable proportion of that sum in the limitation action, and not to

C. A. 1921

THE COUNTESS.

a sum which is subject to a dispute in a detinue action to which they are not parties. It is true that maritime liens for damage rank in order of date and where there are several claims against a res priorities arise, but no priorities arise in the case of claims against a limitation fund which has to be paid into Court on account of one act of negligence from which all the claimants have suffered damage. Once it is admitted on behalf of the Board that the rights given by s. 94 of their Act of 1858 are affected to some extent by the limitation sections in the Merchant Shipping Acts their case has gone ; if s. 94 is affected at all, and it seems clear from the language of s. 3 of the Act of 1900 that it is affected, it is affected to the full extent provided by the limitation sections which provide for distribution rateably—i.e., pari passu. The earliest limitation Act applying to limitation of liability for collision (53 Geo. 3, c. 159), by s. 7 provided that the distribution should be " rateably " and according to the rules of equity. The decree in the limitation action should stand simpliciter without any clog upon the distribution of the fund.

Leslie Scott K.C. in reply. The rights of the Board must be judged as if no detinue action had been brought at all. If the ship were still in the possession of the Board, as, but for that action and the order of the Court of Appeal therein, she would have been, the Board could have detained her until the decree had been made in the limitation action and they had been paid the full statutory amount of the shipowners' liability, 4468*l.* The claim under s. 94 of the dock Board's Act of 1858 is not reduced, but the amount of the debtors' liability is reduced, and that is the only effect of the limitation sections. The Board's statutory right of detention has precedence over maritime liens of prior date : *The Emilie Millon.* (1)

[Reference was also made to *River Weir Commissioners* v. *Adamson.* (2)]

Cur. adv. vult.

(1) [1905] 2 K. B. 817. (2) (1877) 2 App. Cas. 743.

Dec. 20. The following judgments were read :—

LORD STERNDALE M.R. [after setting out the facts]. Some question was raised before us as to the jurisdiction to make the order releasing the vessel on payment of 5500*l.* into Court. I do not think we ought to entertain the question at all. The order was made and no appeal against it was ever entered, and it must be taken as a right and proper order. It does not seem to me to affect the rights of the parties. If the Board had the right to detain the ship they had the same right over the sum of 5500*l.* which was substituted for her by the order, but I think a little confusion has been introduced into the proceedings by the fact of the ship being released and money substituted.

The important question is whether the Board are entitled to detain the ship, or the money representing it, until they are paid the damage done to their works up to the statutory limit of 8*l.* per ton irrespective and to the exclusion of other claims arising out of the accident, or whether they have to come in and take their share of 8*l.* per ton pari passu with the other claimants. This, in my opinion, is a matter in which the plaintiffs, the owners of the *Countess*, have only an indirect interest because, for reasons I shall give hereafter, I do not think that a judgment in favour of the right of detainer obliges the plaintiffs to pay more than the statutory amount of 8*l.* per ton. The persons who are really interested are the other persons who have claims against the plaintiffs in respect of the accident. They are not parties to either of the actions but appeared in the Court below, they were served with notice of the appeal, though not strictly speaking respondents, and counsel argued the matter on their behalf before us.

The question depends upon the proper construction of s. 94 of the Mersey Dock Acts Consolidation Act, 1858, ss. 503 and 504 of the Merchant Shipping Act, 1894, and s. 1 of the Merchant Shipping Act, 1900. The first-named section is as follows : " In every case in which any damage shall be done to any lock . . . . or other work belonging to the Board, through the misconduct, negligence, or default of the master of any vessel, or any other person on board of any vessel,

BIBL. LONDIN UNIV.

C. A. 1921

THE COUNTESS.

Lord Sterndale M.R.

the amount of such damage may be recovered . . . . in a summary way," or "at the option of the Board such vessel may be detained until such damage shall have been paid for or a deposit shall have been made by the master or owner of such vessel equal in amount to the claim or demand made by the Board for the estimated amount of damage so done by such vessel." There seems to be no question that this section gives a right to detain a vessel doing damage or a deposit in lieu thereof until the whole of the damage is paid. It is a possessory lien given by statute which it is not necessary to enforce by action and is not, in my opinion, subject to the same considerations as a maritime lien. Though the section speaks of the amount of damage being ascertained it does not specially provide any method of ascertainment, and, I think it must have contemplated the usual method—i.e., that the owner of the ship or the deposit should demand its release on payment of a certain amount, and that the question of whether that amount was sufficient or whether the Board were entitled to detain for a larger sum should be determined either in an action of detinue or an arbitration to determine the amount. I do not think it was necessary for the Board to bring an action against the shipowner though they could do so. It was enough for them to rely upon their lien and refuse to give up the ship till payment. It was suggested during the argument that the proper method was by a claim under s. 504 of the Merchant Shipping Act, 1894. This certainly could not have been so under the corresponding s. 514 of the Merchant Shipping Act, 1854, at the time of the passing of the Act of 1858, for s. 514 only took effect in the case of a limitation under s. 503. Nor could it have been so under s. 503 of the Merchant Shipping Act, 1894, until 1900, for until then there was no limitation for damage like this done to dock works.

The learned President has held that by virtue of this section the Board had a right to detain the ship until a decree had been made in a limitation action, and as no such decree had been made at the date of the writ in the detinue action, that action must fail, and in that I agree with him, but he held

that when a decree in a limitation action had been made the Board lost any right of detainer which they had, or only retained an absolutely useless right—i.e., a right to detain a proportion of the 8*l.* per ton pari passu with the other claimants for which no right of detainer is necessary, as according to his contention that sum is awarded to the Board by the Court out of money in Court. If the plaintiffs had not asked for the limitation it is not disputed that the Board would still have had a right of detainer for the larger sum. It seems odd that the right of detention, which as I have said affects the other claimants more than the plaintiffs, for if it exists it gives the Board possession of the ship and the right to be paid out of it in preference to any other claimants, should exist or not exist according to the decision of the plaintiffs not to limit or to limit their liability, but this may be the correct view.

The question really arises upon the defendants' counterclaim, by which they ask for a declaration that they are entitled to payment of the sum paid into Court under the order of the Court of Appeal. They ask: "To be paid out of the sum paid or to be paid into Court under the said order of the Court of Appeal the sum of 4468*l.* 4*s.* 9*d.* or such other sum as shall be decreed by the Court to be the statutory limit of the liability of the said steamship under the Merchant Shipping Acts, 1894–1906, or if there shall be no such decree the actual amount of the damage done to the works belonging to the defendants pursuant to the provisions of s. 94 of their said Act of 1858"; and "That the defendants are entitled to payment of the damage done to the works belonging to the defendants by the said steamship and to the expenses of raising and removing her and of detainer . . ." I am not sure that the counterclaim is quite accurate, for the defendants are only entitled to detain the vessel or the money till the damage is paid to them, but as the sum of 4468*l.* is taken as the statutory limit and it is admitted that the damage to the defendants' property exceeds that amount, in substance they are entitled to receive that sum if they are entitled by reason of this right of detainer to enforce payment of the

C. A. 1921

THE COUNTESS.

Lord Sterndale M.R.

amount legally due to them irrespective of other claimants. The learned President however has held that, although the defendants were entitled at the issue of the writ in the detinue action to detain the ship, they are not entitled to detain the amount in Court representing the ship after the decree in the limitation action, and has ordered the sum paid into Court in the detinue action to be transferred to the credit of the limitation action. The effect of this is to deprive the defendants of the right of detainer, which they admittedly had at the commencement of the detinue action, even for the statutory amount of liability, and to leave them to share equally with the other claimants, in other words to deprive them of the preferential position as regards other creditors in which they were put by s. 94 of the Act of 1858.

This result the learned President thinks is produced by the Merchant Shipping Act, 1900, s. 1, in conjunction with ss. 503 and 504 of the Merchant Shipping Act, 1894. Up to the Act of 1900 no limitation of liability applied to damage such as that suffered by the defendants, but as I have shown, and as the President decided, they were entitled to detain the ship for the full amount of the damage, as they are still if there be no limitation of liability, which might well happen in the case of a foreign owner with no property in this country but the ship. Now that shipping has fallen to a lower value, the position of a ship whose value at 8*l.* per ton is 4468*l.* being worth 34,000*l.* cannot exist. Sect. 1 of the Merchant Shipping Act, 1900, is as follows: "The limitation of the liability of the owners of any ship set by section five hundred and three of the Merchant Shipping Act, 1894, in respect of loss of or damage to vessels, goods, merchandise, or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship." Sect. 2 is a limitation of liability of the Harbour Authority or a Conservancy Authority where damage has been done by them. By s. 3: "The limitation of liability under this Act

shall relate to the whole of any losses and damages which may arise upon any one distinct occasion, although such losses and damages may be sustained by more than one person, and shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act." I have read ss. 2 and 3 because the learned President attaches some weight to them, but I cannot myself see their bearing on the position at issue. Sect. 3 applies the limitation to all claims however arising, but it does not deal in any way with their remedies or methods of recovering the limited amount.

To determine the question of the right of the Board it is necessary to look at their position when the Merchant Shipping Act, 1900, was passed and the effect of that Act upon their position. Limitation of liability as provided by the Merchant Shipping Act, 1894, was not a creation of that Act; it existed at any rate as early as the Merchant Shipping Act, 1854, ss. 504 and 514 of which Act correspond to ss. 503 and 504 of the Act of 1894, and the position as to limitation was therefore the same when the Mersey Dock Acts Consolidation Act of 1858 was passed as after the passing of the Merchant Shipping Act, 1894. It is true that the measure of limitation was not the same in 1854, the measure of 8*l.* per ton being introduced by the Merchant Shipping Act, 1862, s. 54, but the principle is the same. That position was that limitation of liability did not apply to claims by a dock authority for damage done to their property, and that such an authority had a right of lien on or detainer of the wrong-doing vessel until the whole amount of the damage was paid. This right might, of course, entirely deprive other claimants in respect of damage by the same accident of any compensation for the damage suffered by them, for the lien might very well exist in respect of an amount far greater than the value of the ship at 8*l.* per ton.

This being the position, it is in the next place necessary to see what alteration in the rights of the Board was made by the Merchant Shipping Act, 1900. The relevant section of that Act is s. 1, which I have already read. That is in

C. A. 1921

THE COUNTESS.

Lord Sterndale M.R.

terms nothing more than a limitation of the amount which a dock authority can recover under s. 503 of the Merchant Shipping Act, 1894; it does not in any way mention the lien given by the Mersey Dock Acts Consolidation Act, 1858, for the damage, and in my opinion it has no other effect than to limit the amount for which the lien can be exercised. It seems to me to be quite clear that this statute affects only the amount to be recovered; it includes in the statutory limitation damage done to dock property, but it does not expressly or impliedly affect in any way the method of recovering the amount which is legally recoverable. I think its only effect is to limit the amount for which the ship may be detained to the statutory limit of 8*l.* per ton. The object of s. 1 is only to limit the amount for which the shipowner is liable: it is not in any way concerned with the way in which a legal right given to one creditor for the recovery of that amount may affect the rights of other claimants. No enactment was mentioned to us which in express terms deprives the defendants of their lien, but it was argued, and the learned President has held, that they are deprived of it by implication from the terms of s. 504 of the Merchant Shipping Act, 1894. It cannot be suggested that that section was passed in any way in view of this lien, for, as I have said, it is merely a repetition of a section existing in 1854 before the lien was created and at a time when no limitation in respect of damage of this nature existed. To deprive any person of a lien expressly given by implication from a section passed in respect of other matters altogether seems to me unusual and to require very clear and distinct words raising that implication. I cannot find such words here.

Sect. 503 of the Merchant Shipping Act, 1894, like s. 504 of the Merchant Shipping Act, 1854, merely limited the amount of liability, and without any other section would have given a right to plead that limitation in defence. It seems, however, to have occurred to the framers of the Act that, where there were conflicting claims to which the limitation applied, great confusion might result if actions in respect of all the claims were allowed to proceed in the

face of that defence, and therefore, ss. 504 and 514 were passed giving power to the Court to determine the amount of the owners' liability and distribute that amount rateably (whatever may be the meaning of that word) among the claimants, to stay proceedings in actions, and do other things on such terms as to security and otherwise as the Court shall think fit. Of course, when the earlier of those sections was passed there was no right of lien in favour of any claimant to whom the Act applied and no difficulty could arise in the working of the section. This is so now in the vast majority of cases, and the ordinary businesslike way of proceeding is for the shipowner to pay 8*l.* per ton into Court and for the Court to distribute that amount pari passu amongst the claimants who in ordinary cases stand on the same footing. The provisions of ss. 504 and 514 are not however compulsory; the owner need not apply under them, and the Court is not compelled to act under them if to do so would work injustice to one of the claimants, and this would be the case if the plaintiffs were thereby deprived of a lien of which they had not been otherwise deprived. The very word "may" seems to me to carry the meaning "may if the circumstances permit" and not "shall whatever may be the circumstances and whatever the rights of the claimants would otherwise be." The words in s. 514 of the Merchant Shipping Act, 1854, are very similar. "It shall be lawful . . . . for the Court . . . . to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability . . . . and for the distribution of such amount rateably. . . . ." The position would be an extraordinary one, the defendants are not deprived of their lien by s. 1 of the Merchant Shipping Act, 1900, but by that section and s. 504 of the Merchant Shipping Act, 1894, coupled with two acts of the shipowner which he may or may not do, according to his own will, (i.) to limit his liability, and (ii.) if he do limit his liability, to make an application under s. 504, and coupled also with an act of the Court—i.e., to make an order distributing the amount at which the shipowners' liability has been determined pari passu amongst the claimants.

C. A. 1921

THE COUNTESS.

Lord Sterndale M.R.

I cannot think that it can have been intended that a right of lien expressly given by statute should be destroyed by such an indirect implication as this. I think the learned President has overlooked the fact that the provisions of s. 504 are not compulsory, and has assumed that in every case of limitation of liability the shipowner is obliged to pay 8*l.* per ton into Court for distribution amongst the claimants, irrespective of whether there is a lien on the ship or not. I am under this impression because he seems to assume that the necessary consequence of holding the defendants entitled to a lien on the ship or the deposit representing it would be to compel the plaintiffs to pay the amount twice over. I think here the substitution of a sum of money, 5500*l.*, for the ship, has led to confusion. In law the defendants' lien, if it exist, is on the ship, and if they were holding it under a lien and an application were made by the shipowner under s. 504 the Court in circumstances like these, where the amount of the lien exceeded the value of the ship, would not order the shipowner to pay any more, and, if it thought fit to stay the other claims, ought not in my opinion to require as a condition any security. It seems to me that the defendants were under no necessity to bring any action against the plaintiffs or to bring in any claim under s. 504. If I am right that their right of lien extended to the amount of their damage up to the statutory limit, there was no question in this case as to the amount due to them.

I have assumed up to this that the word "rateably" in s. 504 means pari passu or proportionately to their damage, and it is necessary to do so in order to give any foundation at all to the plaintiffs' or rather the other claimants' arguments. I do not however think that this is the necessary meaning. I think "rateably" may well mean "among all the claimants having regard to any special right or remedy that any claimant may have, and in the absence of any such special right, proportionately to their damage." If this be the proper meaning, s. 504 presents no difficulty to the plaintiffs and the result to the other claimants is that which always follows where another creditor has a lien on the property out of which

all claimants have to be satisfied. I prefer however to base my judgment on the ground which I have endeavoured to set out—i.e., that it could not have been and was not intended to take away a right expressly given by statute by such an implication arising so indirectly and subject to such conditions.

The result is that in my opinion there is nothing in any of the legislation to take away the right of lien or detainer given by the Mersey Dock Acts Consolidation Act, 1858, or to affect it except to limit the amount recoverable to the statutory limit, and that therefore the defendants are entitled to hold the amount in Court representing the ship until payment is made to them for the damage which is, in effect, payment to them of that sum. It follows that the order for the payment of that sum to the credit of the limitation action is wrong. It is not for me to consider the policy of giving preferential rights to public bodies like the Mersey Docks and Harbour Board, but when such rights are given expressly and distinctly by a special Act, I think they ought not to be and cannot be taken away by difficulties which it is said they cause in the permissive working of general statutes not directed to this special point and passed alio intuitu, as s. 504 must have been, for this state of things did not exist for years after it was passed.

It remains to deal with the limitation action, and I do not know that matters are made easier by the two actions being tried together. The first paragraph of the decree is right. I have already said that I think the second paragraph so far as it orders the money in Court to be paid to the credit of the action is wrong, and it remains to deal with the other paragraphs of the plaintiffs' claim. I do not think that it follows from the conclusion at which I have arrived that the plaintiffs are bound to pay the amount, which they ask to pay, into Court, or that the Court is bound to order them to do so and then proceed to distribute that amount. No doubt that prayer, which is the usual one in ordinary circumstances, was put in to enable the plaintiffs to argue that a judgment in the detinue action in favour of the defendants would oblige the plaintiffs to pay 16*l.* per ton and not 8*l.* and so be

C. A. 1921

THE COUNTESS.

Lord Sterndale M.R.

contrary to the law as to limitation. I do not think that is the case. I think the Court will have to deal with the matter on the footing that the plaintiffs have already paid up to the statutory amount of their liability and cannot be called on to pay any more. It seems to me that the Court can adopt one of two courses. It may refuse to stay the actions mentioned and leave the plaintiffs to set up their limitation of liability as a defence, which they can do, or it may stay them without requiring any security or any money in Court on the ground that no good result can be produced by proceeding with them. In some cases there are great difficulties in setting up the statutory limitation as a defence, but I do not think that would be so in this case. It would be enough to plead that the statutory amount had already by force of law been paid in respect of that liability. I think, however, that in the circumstances the proper course is for the Court to stay the actions without requiring security or the payment of money into Court. I think the Court has power to take such a course, if it appear that to allow the actions to proceed would only produce useless expense and no good result.

There is another point raised in this case which is of great, though not equal importance to the defendants—i.e., whether they are entitled to detain the ship in respect to the expenses of securing and repairing the *Countess*. This, as I have said, was agreed at 1048*l*. and was paid into Court, under the order of the Court of Appeal when the ship was released. If the defendants cannot recover these sums as expenses they can possibly recover them as salvage, and the importance of the point arises because the regularity of the proceedings of the assistant marine surveyor is questioned. The matter depends upon s. 7 of the Mersey Docks and Harbour Act, 1912, which is as follows: "The Board may raise destroy or remove the wreck of any vessel or any vessel . . . . sunk or stranded in any dock or elsewhere within the port of Liverpool or any of the sea channels leading thereto and which shall be in the judgment of the marine surveyor for the time being of the Board or in case of his absence or disability then of the assistant marine surveyor . . . . such

judgment being recorded in writing signed by him and deposited with the secretary of the Board an obstruction or impediment or danger or is likely in such judgment as aforesaid to become an obstruction impediment or danger to the safe and convenient navigation or use thereof and may . . . . sell in such manner as they may think proper the said vessel or wreck . . . . and out of the proceeds of such sale . . . . may retain the expenses of raising destroying or removing such vessel or wreck. . . . ." The facts and arguments on this point are very clearly set out in the judgment of the learned President and as I agree with him I do not think it necessary to set them out again. I think the judgment on this point is right.

In my opinion the appeal should be allowed and the cross-appeal dismissed, but as the other members of the Court are of a different opinion on the first point, both appeal and cross-appeal are dismissed with costs.

ATKIN L.J. The issues raised in this case are of importance to shipowners and dock companies, and present complications, which make it very necessary to consider carefully the facts. [His Lordship stated the facts previously set out and continued :] The rights of the respective parties appear to have been as follows :—

(i.) The defendants had a maritime lien against the *Countess* for damage done to the dock gates. This lien they might have enforced by proceedings against the *Countess*. They have taken no such proceedings ; and in their counter-claim in the detinue action they seek for no relief in respect of their maritime lien, or any rights in personam. The defendants' sole rights now in respect of such damage, except as expressed by statute, would be confined to sharing rateably in the distribution in the limitation suit.

(ii.) The owners of the barges had a maritime lien against the *Countess* for damage done. This they have enforced by proceedings in rem in which bail has been given. The *Countess* was thereupon freed from their lien and from any liability to arrest in respect of the claims for which bail was

C. A. 1921

THE COUNTESS.

Atkin L.J.

given. All these actions have been properly stayed in the limitation suit, and the sole right of these claimants is to share rateably in whatever distribution is made in that suit.

(iii.) Subject to their having complied with the formalities prescribed by the section the defendants were entitled to detain the *Countess* in respect of wreck expenses, and to sell her in order to recoup themselves those expenses. The rights of the defendants over the ship are now transferred under the order of the Court of Appeal to the sum in Court representing the estimated amount of those expenses. The limitation suit does not in any way affect the defendants' rights to these expenses, and the sole question for determination is whether the statutory conditions have been complied with.

(iv.) Under s. 94 of the defendants' Act of 1858 the defendants were entitled to detain the *Countess* until the damage done to the dock gates has been paid for. This they continued to do until the above-mentioned order of the Court of Appeal. Under the order the money paid into Court was to be treated as though it represented the deposit which, under the section, it was the alternative right of the defendants to receive and retain until the entire amount of the damage was paid. The result of the order seems to be that the defendants no longer are deemed to retain the ship but are deemed to retain the deposit on the terms of the section.

What then are the rights of the defendants under the section? (A) They have only a right to detain the ship, or as now to retain the deposit until payment. They have no right to realize the ship or pay themselves out of the deposit. In other words they are given by statute a possessory lien. (B) The statutory right appears to be a right paramount to previously attaching maritime liens. This was the decision of the Court of Appeal in *The Emilie Millon* (1) in respect of the dock company's powers under s. 253 of their Act to detain ships until dock tonnage rates are paid. I am unable to distinguish such power of detention from the

(1) [1905] 2 K. B. 817.

power to detain for dock damage under s. 94 and I must accept the decision as binding upon us. (C) They have no power to determine for themselves what the amount of the damage is on payment of which the right of detention ceases. This was expressly admitted before us by counsel for the Board; and in any case seems clear. The amount of the damage when in dispute must therefore be determined by some appropriate legal tribunal and on legal principles. (D) I think it follows from the above that if the amount of damage recoverable is limited by statute, the limited amount is the amount for which the Board may detain, and the right to detention ceases when that limited amount of damage is paid. I can see no difference in this respect between a maritime lien for collision damage and a statutory possessory lien for collision damage.

Sect. 503 of the Merchant Shipping Act, 1894, provides that the owners of a ship shall not, where any loss or damage is caused to another ship by reason of improper navigation, be liable to damages beyond, in respect of damage to vessels, an aggregate amount not exceeding 8*l.* for each ton. It is in fact common ground that the defendants cannot detain the *Countess* and cannot detain the deposit for more damages than the aggregate amount of the limited liability of the owners. I think it also follows that the Board are also bound by the provisions of s. 504 and can only claim a rateable share of the total liability of the owners. Again I see no distinction between the maritime lien and the statutory lien. It is to be noticed that the section as to rateable distribution applies notwithstanding that one or more of the damage claimants have arrested the ship and are actively enforcing the maritime lien. But in truth the matter seems to be finally disposed of in the Merchant Shipping Act, 1900, s. 3. The Act applies the limitation of liability to liability for damage to docks and by s. 3: "The limitation of liability under this Act . . . shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act."

C. A. 1921

THE COUNTESS.

Atkin L.J.

It is in this respect that I differ reluctantly from the judgment of the Master of the Rolls. Once it is conceded that the limitation of liability statutes apply to the lien so as to limit the amount of damage for which the ship can be held, I can see no logical ground for restricting the full operation of the statute. If 10,000*l.* the full damage is to be reduced at all it appears to me that it must be reduced not merely to 4468*l.* but to the Board's rateable proportion of 4468*l.* I see nothing however in the limitation of liability Acts to deprive the Board of the advantage of their possessory lien whether exercised over the ship or over a deposit made under s. 94 of the Dock Act. I think that they are entitled to exercise that lien until they are in fact paid the rateable amount of the total liability to which they are entitled under the limitation of liability Acts. The money paid into Court in the detinue action should remain in Court in that action. Except by consent I see no power to transfer it to the credit of the limitation suit. I regret this part of my decision, for it is obvious that the Board for all practical purposes will always be sufficiently secured by the sum paid into Court in the limitation suit. Statutory rights however are not to be abrogated except by plain enactment, and it is sufficient to assume that in a great shipping port such a representative body as the Mersey Docks Harbour Board are not likely to exercise their rights unconscionably or so as to embarrass shipowners unreasonably.

The point as to wreck expenses can be disposed of shortly. It is clear that the Board acted with care and prudence in taking the steps they did to prevent the stranded *Countess* from being a danger to navigation. The objection that was pressed upon us was the technical objection that the judgment of the assistant surveyor that the vessel was a danger to navigation was formed when the vessel was afloat and was at that time neither a wreck nor stranded. I reserve consideration of whether a vessel holed by collision in imminent peril of sinking and out of control is a wreck. It is plain from the evidence that the assistant surveyor of the Board formed his judgment on the basis that the vessel though

then afloat must under the circumstances inevitably be beached. It seems to me impossible to give effect to the contention of the respondents in this matter without putting such a narrow and unreasonable construction on the statute as would seriously limit its useful operation.

I think therefore that the decree of the President should be amended in respect of the transfer of the sum in Court from the detinue action to the limitation suit but that in substance the appeal fails and that the cross-appeal should be dismissed. The order of the Court in the appeal in the detinue suit is that the decree of the President be varied by omitting the order for transfer of the sum of 4451*l.* 13*s.* 1*d.* to the credit of the limitation suit, and by adding an order that such sum remain in Court until further order with liberty to either party to apply as to payment out, and subject to such variation the appeal of the Board and cross-appeal of the owners of the *Countess* be dismissed with costs.

In the appeal in the limitation suit the order of the Court is that the decree of the President be varied by omitting the words from "upon the transfer to the credit of this action" down to "making together the sum of 4468*l.* 4*s.* 9*d.*" and substituting "upon payment into Court of the sum of 4468*l.* 4*s.* 9*d.*," and that subject to such variation the appeal of the Board be dismissed with costs.

YOUNGER L.J. There have been in this litigation very serious issues of detinue raised between the owners of the *Countess* on the one hand—I shall in this judgment refer to them as the owners—and the Mersey Docks and Harbour Board on the other. These issues were decided against the owners by the learned President. They were made the subject of a cross-appeal before us. I agree with my Lord and the Lord Justice that they were rightly decided against the owners, and that their cross-appeal with reference to them fails.

I dispose of these issues at the very outset, although they were only the subject of a cross-appeal, in order at once to emphasize the fact that these have throughout been the only

C. A. 1921

THE COUNTESS.

Younger L.J.

issues in this litigation in which the owners had any primary interest. The issue which remains for consideration is one, not merely of difficulty, but to the Board of permanent interest and of great importance, and to Mr. Balloch's clients, the bargeowners, of vital consequence; but it is for the owners, as it has turned out, of little moment on any view of the case. It is, I think, now agreed that their maximum liability in respect of all claims arising from the negligence of those on board the *Countess* on June 5, 1920, has been effectually limited to the sum of 8*l.* for each ton of her registered tonnage. That sum the owners have found, and as directed by the Court of Appeal they have paid it into Court, and they have had their vessel released. No one contends that they can be required to make any further final payment on that account; while, as the admitted claims against the payment already made far exceed the whole fund, they have no further concern in its proper distribution. That proper distribution is the remaining important issue to which I have referred, and on that it is the bargeowners who are in acute controversy with the Board. These bargeowners, in consequence of the negligence of those on board the *Countess* on the day in question, have sustained damage amounting in the aggregate to a sum far exceeding any sustained by the Board on the same occasion, and for the satisfaction of their claims they can now only look to their proper share of the compensation fund. But the Board claim the whole of that fund for themselves. If therefore the contentions of the Board be sustained the bargeowners will in respect of their loss receive no compensation at all, and the whole of the only fund to which recourse for the purpose can be had will go to or be retained by the Board.

And yet by a series of fatalities in procedure amounting almost to a record of invincible mischance this issue of such vital concern to the bargeowners has throughout been staged and contested as if they had no concern in its result. It has been raised and fought in the detinue action between the owners and the Board, an action to which the bargeowners were in no sense either parties or privies. It was

to the credit of that action that the compensation fund stood. It was so paid into Court by an order made without notice to the bargeowners. The limitation suit, in which an appearance on behalf of the bargeowners was entered and in which alone any claim is competent to them, was uncontested by the Board either by pleadings or, so far as I can find, at the trial. The bargeowners were not made respondents to the notice of appeal of the Board from the learned President's judgment in the detinue action in which the ultimate destination of the limitation fund was dealt with, and on which appeal the Board claim payment of it to themselves. The bargeowners are not even made parties to the notice of appeal of the Board from the order of the President in the limitation suit. How, in short, it has come about that all through the real position of the bargeowners with reference to this fund has been so completely lost sight of, I cannot even conjecture. It is true, that, as a matter of courtesy I presume, their solicitors were informed by the solicitor of the Board of the pendency of the appeals as raising, I suppose, a discussion sufficiently intimate to justify a watching, if not an active interest on their part; and it was doubtless in consequence of that informal intimation that Mr. Balloch attended the Court on the bargeowners' behalf and, after the Board and the owners had by their counsel contested the questions at issue, did then, at the invitation of my Lord, present to us the views of the bargeowners. Mr. Balloch's presence and the assistance he rendered upon the appeals probably removes any technical difficulty in the way of our now dealing with a question in which throughout the bargeowners should have been protagonists. Nevertheless I myself doubt very much whether the failure throughout the proceedings properly to recognize their position with reference to this part of the case has not coloured all through, and to their prejudice, the course of the discussions. It has certainly, I think, tended to concentrate attention upon the question whether the Merchant Shipping Act, 1900, could be construed so as to deprive the Board of their statutory rights against the owners under the Mersey

C. A. 1921

THE COUNTESS.

Younger L.J.

Dock Acts Consolidation Act, 1858, s. 94, and has diverted consideration from the same question framed as the bargeowners would frame it—namely, whether that same s. 94 remains effective to enable the Board, when included for the first time by the Merchant Shipping Act, 1900, as claimants upon limited compensation funds, to sweep away for themselves, as in this case, not a rateable proportion of a fund, but the whole of it, leaving for the bargeowners, the remaining claimants, nothing at all. It may well seem to some minds that this consequence of the Act of 1900 is as startling as the other would be. In any case, the true effect of the statute on the position of the Board under their own Act cannot, as I think, be ascertained with any confidence unless the balance between these opposing considerations is throughout strictly maintained. This I shall attempt to do in what follows.

The question to be considered as the President has phrased it, is one as to the effect upon the powers of the Board under s. 94 of their Act of 1858 of the statutory provisions for limitation of liability embodied in the Merchant Shipping Act, 1894, ss. 503 and 504 as extended by ss. 1 and 3 of the Merchant Shipping Act, 1900, by which last-mentioned statute liability for such damage as was here done to the docks of the Board is brought within liabilities capable of limitation under ss. 503 and 504 of the earlier Act. Is the Board's right of detention given them by s. 94 of their Act of 1858 taken away by these sections of the Merchant Shipping Acts in a case like the present? Does the lien upon the vessel created by s. 94 survive notwithstanding the fact that the owners have obtained a declaration of limitation of liability? If it does, is it a lien for the whole amount of their damage, or for the whole of the limitation fund, if that be less than their damage, or only for their due proportion of that fund rateably with the other claimants upon it?

It will be convenient to deal with the sections in their inverse order. Sect. 1 of the Merchant Shipping Act of 1900, while clearly bringing the liability of the owners for the damage done to the dock gates of the Board within the class

of liabilities capable of limitation, does not specifically refer to dock or canal owners, or harbour authorities as being thereby affected. By s. 2, however, these dock or canal owners and harbour authorities are expressly mentioned, and are in terms enabled to limit their own liability for damage caused to vessels by the negligence of their servants, and it cannot, I think, be doubted that the two sections, so far as these owners and authorities are concerned, are complementary the one to the other, a circumstance lending point to s. 3 which, referring to limitation of liability under this Act—that is both under ss. 1 and 2—enacts that such limitation of liability "shall apply whether the liability arises at common law or under any general or private Act of Parliament, and notwithstanding anything contained in such Act." These last words, of course, directly and immediately apply to the Board so as to reduce any statutory liability of the Board as limited by s. 2 to the amount thereby defined. On the other hand their presence makes it less difficult to conclude that the provisions of such Acts are not to stand in the way so far as they give rights in respect of compensation against the owners out of accord with the position of the Board as claimants against the limitation fund to which s. 1 in a proper case relegates them.

I come now to ss. 503 and 504 of the Merchant Shipping Act, 1894. Certain characteristic features of these sections have from time to time been observed upon in judgments dealing either with them or with similar sections in earlier statutes which these have now superseded. It may not be amiss to refer to some of these observations, with reference to the sections. Lord Sumner in *Canadian Pacific Ry. Co.* v. *The Steamship Storstad* (1) said: "Limitation of liability is the creation of statute. It is a provision in favour of the shipowner, and operates to restrict the rights of those to whom he is liable. Incidentally the sections furnish the rule by which to determine the rights of parties interested in the fund created by the operation of the sections themselves, but if the shipowner, for whatsoever reason, does

(1) [1920] A. C. 397, 401.

C. A. 1921

THE COUNTESS.

Younger L.J.

not bring the sections into operation, no one else can do so, and they do not in such case have effect."

Next it is to be observed that the claimants against the fund are by the section to rank rateably, and I have not myself found any case in which this has not brought about a ranking pari passu. The language of s. 504 is a description of the procedure adopted by the Court of Chancery in the administration and division of a deficient fund amongst claimants ascertained by that Court in accordance with its invariable procedure. It was the Court of Chancery by which in England the powers of s. 514 of the Act of 1854 were to be exercised, and its former procedure, now open to adoption by any division of the High Court, is the procedure still pointed at in the present section. The earlier cases on the section are cases in the Court of Chancery, and one of the earliest in which this question of priority arose was *Leycester* v. *Logan* (1) before Sir Page Wood V.-C. In that case the defendant Logan by proceedings in Admiralty had obtained the advantage of sentence against the ship doing the damage, he thereby obtaining, as the Vice-Chancellor put it, security for his costs with which the limitation sections did not enable the Court to deal. But although he had also thereby obtained security for his whole claim Lord Hatherley held that the sections did enable the Court to deal with that security, and he held that the defendant's security was, by virtue of these sections and the limitation decree, limited to his rateable share of the amount to be paid, and he gave directions for the transfer into Court of the proceeds of sale of the ship, there to be dealt with under the sections. Here we have an instance of a claimant with a security being deprived of any priority over other claimants against the fund "created," as Lord Sumner says, "by the operation of the sections themselves."

Speaking for myself I cannot doubt that the language of the section points to rateable pari passu distribution amongst the claimants. This must, I think, be the normal case. *Leycester* v. *Logan* (1) shows that the principle obtains even

(1) (1857) 3 K. & J. 446.

as against a claimant with a pre-existing security. The Scotch case of *Rankine* v. *Raschen* (1), where the purchaser of a claim was subrogated against the fund to the rights of the original claimant, irrespective of the sum he had paid for these rights, establishes the same, and not, as seems to have been contended, the opposite principle. And I find the same principle carried out by the Court of Appeal in *Jenkins* v. *Great Central Ry. Co.* (2) reported apparently only in the Shipping Gazette, and cited in Halsbury's Laws of England, vol. xxvi., p. 614. I specially refer to that case because the procedure adopted there might not be inappropriate here on one view of the Board's position. In that case a cargo owner had succeeded in the Court of first instance in a claim against a shipowner for loss of cargo consequent on collision. The whole amount due under the judgment was paid into Court as a condition of stay pending appeal. Notice of appeal was given, but subsequently the shipowner having, after the judgment, obtained a limitation decree and paid into Court the full amount for which he was liable under the Merchant Shipping Acts, asked leave to withdraw his appeal, claimed to have the money he had paid in returned to him, and sought an order that the cargo owner should be left to satisfy his claim from the limitation fund. The Court of Appeal is stated to have held that the shipowner was entitled to the payment out and to the order he sought.

But the matter may be stated more broadly. It seems to me that the idea of priorities amongst the claimants against a limitation fund is inconsistent with the principle underlying s. 504 itself. That is a section designed for the protection of a shipowner who is himself free from personal fault. On the terms that in the limitation suit he puts up or provides a fund equal to the prescribed limit of his statutory liability the shipowner and his property are, as a result of the Court's decree, relieved of all claims in respect of the act of negligent navigation in question competent to any one who can be reached by the Court's order. All such claimants, if they would receive their share of the fund, must prove their

(1) 4 R. 725.

(2) (1912) Shipping Gazette, Jan. 13.

C. A. 1921

THE COUNTESS.

Younger L.J.

claim in the suit. Independent actions against the shipowner by any claimants are stayed. Any security for his claim, obtained by a claimant as a result of any such action, ceases to be either valuable or appropriate; because security for every claimant to the full extent of the shipowner's limited liability is now provided in the limitation suit to which and to the fund there all claimants must now resort for satisfaction. They may resort to no other fund. If they were permitted to do so the shipowner would not enjoy the protection aimed at and provided for him by the section. And as against that fund the only condition of ranking is that the claimant shall establish his claim. Thereupon he becomes entitled to his rateable share so soon as all other claims upon the fund have been ascertained. A security upon any other property of the shipowner can be of no advantage to a claimant against the fund and priority of ranking against the fund itself is not contemplated by the section. Equality here is equity.

Remembering that it is to such a fund so administered that the Board are now by the Merchant Shipping Act, 1900, relegated in respect of their present claim against the owners, we may proceed to consider the effect of that situation upon the rights of the Board under s. 94 of their Act of 1858, passed of course in view of no such state of things. How far are these rights necessarily modified by the fact that the claims of the Board against a shipowner for injury done by his ship to their property are now a subject of limitation under the Merchant Shipping Act? I apprehend that their rights under the section must for the future be exercised with full reference to that fact and in due subordination to the privileges of the owner under these Acts, as so extended.

That being, as I conceive, the general principle to be applied I will now proceed to consider the application of it more in detail. And first, for the reason that the sections in question of the Merchant Shipping Act have no effect unless the shipowner chooses to bring them into operation, it follows that except in that instance, and it will, I imagine, be of infrequent occurrence in cases of damage done by a vessel to dock property, s. 94 remains in full force. This again involves

that the section remains in full force until these sections have effect; and in my judgment that moment certainly does not arrive until a decree of limitation has been made. Until that moment it cannot be known whether the decree will be finally asked for, or whether if asked for the shipowner will be entitled to it, or whether it will be made. It is, however, I understand, now conceded by the Board that when such a decree is made the deposit capable of being retained by them can never exceed the amount of the limitation fund. They concede that the provision of s. 503 of the Merchant Shipping Act that the owners shall not be liable beyond that amount must at least to that extent have full effect notwithstanding the provision of s. 58 of their Act, which fixes the deposit as of a sum equal in amount to the claim or demand made by the Board for the estimated amount of the damage done by the vessel to their property. The Board, therefore, do not now contend—they could not I think do so with success—that on decree in limitation being made they retain any lien for the whole of their damage. The sole question therefore is now whether they have a lien to the extent of the whole of the limitation fund, if less than their damage, or only for their due proportion of that fund rateably with the other claimants upon it; and after decree made and fund provided in the limitation suit, whether they have any lien at all.

In my opinion they have certainly not more than a lien for their due proportion. The operation of the sections of the Merchant Shipping Act which is effective to reduce the deposit, must be effective also, as I think, to reduce their share of it. I can see no true distinction between the position of the Board and that of the defendant in *Leycester* v. *Logan* (1), or of other claimants with a pre-existing maritime lien. I am led to this conclusion on a consideration of the general principles underlying s. 504 to which I have already referred. In my opinion these are quite inconsistent with the retention of a lien for any larger amount. It is said, I know, that this conclusion involves a serious interference with the Board's statutory rights, never, at least in terms, repealed. I feel

(1) 3 K. & J. 446.

C. A. 1921

THE COUNTESS.

Younger L.J.

greatly the force of that view held as it is by my Lord, but I cannot myself resist the conclusion that an alternative which would preserve intact and paramount the Board's lien over the deposit, even extinguishing, as in the present case, all interest in the fund of all other claimants, involves an interference with what I conceive to be the position of these claimants under the Merchant Shipping Act, far more drastic and far-reaching. Indeed, if I followed my own view alone, I should in this case be ready to go as far as the learned President has gone, and would direct now the transfer of the limitation fund from the credit of the detinue action to that of the limitation action, on the ground that so soon as the fund is constituted in the limitation action after decree made all right on the part of the Board to retain their deposit is at an end. On the view I am disposed to take of the Board's position *Jenkins* v. *Great Central Ry. Co.* (1) would justify an application by the owners to have the deposit paid out to them so soon as an equivalent amount had been paid to the credit of the limitation action in accordance with their own submission to make it, and to require that payment to be made in the present case would be mere circuity of procedure. But I recognize that this course, convenient though it be, and not without justification as I must think it is, does disregard the provisions of s. 94 of the Act of 1858, further than is strictly necessary for the working of the limitation procedure, even although it deprives the Board of no substantial benefit. I acquiesce, therefore, although not without some reluctance, in the course proposed by the Lord Justice who is of opinion that the Board cannot be required to part with their deposit until they have actually received in the limitation action their proportionate part of the fund in satisfaction of their claim.

THE MASTER OF THE ROLLS. I may say on the judgment of the majority of the Court I agree with the variations suggested in the decrees by Atkin L.J.

Appeals dismissed.

(1) (1912) Shipping Gazette, Jan. 13.

Solicitor for the Dock Board: *W. C. Thorne, Liverpool.*

Solicitors for the shipowners: *Charles Lightbound & Co., Liverpool.*

Solicitors for appearers in the limitation action: *Thomas Cooper & Co.*, for *Hill, Dickinson & Co., Liverpool.*

C. A. 1921

THE COUNTESS.

E. C. M. T.

ADMIRALTY.

(IN PRIZE.)

1921 *Dec.* 13, 21.

In the Matter of the MESOPOTAMIA OPERATIONS, 1917.

THE SULMAN PAK AND OTHER VESSELS.

Prize Court—Prize Bounty—Naval Captures—Joint Naval and Military Operations—Naval Prize Act, 1864 (27 & 28 *Vict. c.* 25), *s.* 42.

In the course of the advance on Baghdad the Commander-in-Chief of the Army in Mesopotamia ordered the naval flotilla, forming part of the naval forces acting in concert with the Army, to push on and inflict as much damage as possible. The flotilla advanced up the Tigris, and fought and captured several armed Turkish vessels. The British cavalry were also advancing, but had been held up by a strong Turkish rearguard, and were some miles away and out of reach of the flotilla when the captures were made.

On a motion by the officers and crew of the flotilla for prize bounty under the Order in Council of March 2, 1915, whereby, pursuant to the provisions of s. 42 of the Naval Prize Act, 1864, a sum calculated at the rate of 5*l.* for each person on board the enemy's ship at the beginning of the engagement was distributable among such of the officers and crews of any of His Majesty's ships of war as were actually present at the taking or destroying of any armed ship of the enemy, it was objected that the captures were the result of a joint naval and military operation, and therefore outside the provisions of the statute: *La Bellone* (1818) 2 Dods. 343:—

Held, that the question was not whether on the date in question the flotilla and the troops were engaged in a joint scheme of operations, but whether they were jointly engaged in the capture of the Turkish vessels; that the troops in fact took no part in the capture; and that the officers and crews of the flotilla were entitled to bounty.

MOTION for prize bounty.

The claimants, Captain Wilfrid Nunn, R.N., and the officers and ships' companies of His Majesty's ships *Tarantula*,

1921

MESOPOTAMIA OPERATIONS, 1917, *In the Matter of the.* THE SULMAN PAK, ETC.

Mantis and *Moth*, sought a declaration that in accordance with the provisions of s. 42 of the Naval Prize Act, 1864, put in force by an Order in Council of March 2, 1915, they were entitled to prize bounty for the capture of four armed Turkish vessels in the River Tigris on February 26, 1917, during the Mesopotamian operations. The claim was resisted on the part of the Crown on the ground that the captures were the result of conjoint naval and military operations made in the course of carrying out the directions of the General Officer Commanding the Army in Mesopotamia.

The facts are fully set out in the judgment.

Wilfred Lewis for the claimants.

C. W. Lilley for the Procurator-General on behalf of the Crown.

[In the course of the arguments, which sufficiently appear from the judgment, reference was made to *La Bellone* (1); *The Triumph and the Usk* (2); *The Feldmarschall* (3); *The Stella del Norte* (4); *The Vryheid* (5); and *The Banda* and *Kirwee Booty*. (6)

Cur. adv. vult.

Dec. 21. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: This is the claim of Captain Wilfrid Nunn, R.N., and the officers and ships' companies of His Majesty's ships *Tarantula*, *Mantis* and *Moth*, for an award of prize bounty under s. 42 of the Naval Prize Act, 1864, in respect of the capture of the armed Turkish vessels *Sulman Pak*, *Sumana*, *Pioneer* and *Basrah*, on the River Tigris on February 26, 1917, during the operations in Mesopotamia which resulted in the overthrow of the Turkish authority in that year, the capture of Baghdad, and the occupation of the country by His Majesty's forces. The number of persons on board the captured vessels at the commencement of the engagement in which they were captured is placed at

(1) (1818) 2 Dods. 343.
(2) [1917] P. 127.
(3) [1920] P. 289.
(4) (1805) 5 C. Rob. 349.
(5) (1799) 2 C. Rob. 16.
(6) (1866) L. R. 1 A. & E. 109.

1549, and the claim for bounty at the rate of 5*l.* per head is 7745*l.*

1921

MESOPOTAMIA OPERATIONS, 1917, *In the Matter of the.* THE SULMAN PAK, ETC.

The President.

The validity of the claim depends upon the answer to the question whether the capture of the Turkish vessels was a purely naval operation, or was a conjoint operation of sea and land forces. Apart from this question, nothing is in dispute between the claimants and the Lords Commissioners of the Treasury. The grounds of objection to the claim were that the action of the naval flotilla was ancillary to that of the army, that the capture was made in course of carrying out directions of Sir Stanley Maude, Commander-in-Chief of the Army in Mesopotamia, and that the capture was rendered possible by the operations of the army under Sir Stanley Maude's command.

The flotilla in the Tigris, which was under the immediate command of Captain Nunn, formed part of the naval forces on the East Indian station under the then Vice-Admiral, Sir Rosslyn Wemyss, Commander-in-Chief. It acted in concert with the army, its commander doing all in his power to meet the requirements of the Commander-in-Chief.

Sir Stanley Maude's despatch of April 10, 1917, which was put in evidence, describes fully the plan of the campaign in course of which the capture was made. Turkish forces of great strength, centred at Sannaiyat on the Tigris and holding positions of wide extent on both banks, barred the intended British advances upon Baghdad. Down river British naval forces operated. Up river Turkish armed craft and river transport occupied the waterway and maintained the river communications of the enemy. To capture Sannaiyat, cross the Tigris higher up, clear the right bank and advance in force on the left bank and drive the enemy beyond Baghdad, appear to have been the successive operations which were resolved upon by the Commander-in-Chief. Of the part played by the flotilla, Sir Stanley Maude says in his despatch: "They carried out somewhat restricted but none the less important duties in the earlier part of the period. The fact that the enemy barred the way at Sannaiyat necessitated their work being at first limited to assisting in the protection of

1921

MESOPOTAMIA OPERATIONS, 1917, *In the Matter of the.* THE SULMAN PAK, ETC.

The President.

our water communications, co-operating with our detachments on the Euphrates front, and occasionally shelling the enemy's position at Sannaiyat, when the naval kite-balloon section rendered good service in observation work. Their opportunity came later, when after the passage of the Tigris they pressed forward in pursuit and rendered brilliant and substantial services." The services so designated consist substantially of forcing the passage of the Tigris beyond the Turkish rearguard position and effecting the captures now in question, to which some reference in detail must necessarily be made.

Sir Stanley Maude's despatch divides the military operations into eight periods, of which two come in question here—namely, "The capture of Sannaiyat and passage of the Tigris—February 17th to 24th," and "The advance on Baghdad—February 25th to March 11th." The flotilla co-operated on February 22 and 23 in the operations against Sannaiyat and in the fighting which attended the crossing of the Tigris. On February 24 it moved up river, and late at night took possession of Kut. During the whole day of February 25 fighting with the Turkish rearguard proceeded. By a forced march during the night of the 25th the main force of the Turkish army placed a substantial distance between themselves and the British land forces. Sir Stanley Maude, early on the 26th, directed the flotilla to "push on and inflict as much damage as possible." Advancing up the Tigris they encountered at Nahr Kellah formidable fire from Turkish rearguard forces in occupation of a strong position in the Nahr Kellah bend. The course of the river gave a great advantage to the enemy. It changes at the extremity of a narrow peninsula from a course of about due north to a course of about due south. Strong Turkish forces occupied the bank in considerable strength, and although the cavalry of the British forces, supported by field guns, engaged this powerful rearguard, the general British advance appears not to have reached Nahr Kellah during that or the next day. The main body of the Turkish army was retreating through the desert on the left bank of the Tigris. The flotilla, however,

1921

MESOPOTAMIA OPERATIONS, 1917, *In the Matter of the.* THE SULMAN PAK, ETC.

The President.

forced its way beyond the extremity of the peninsula and steamed up the Tigris, and at a distance, as Captain Nunn showed, of from fifteen to twenty miles in a direct line beyond Nahr Kellah, overtook the armed vessels of the Turkish river service, and made the captures now in question. The captures took place in the early evening. The vessels anchored for the night near the furthest point reached in the operations and remained there the next two days. The prizes were sent down the river. On March 1 the flotilla again advanced, and on the morning of that day the *Tarantula* reached Azizjeh just as the troops were entering that village. The reach in which the last captures were made on the 26th was stated to be about five miles as the crow flies below Azizjeh, and about twenty miles in a direct line above Nahr Kellah. By reason of the tortuous course of the Tigris, the distances on the waterway greatly exceed the distances overland.

The contention that the capture of the Turkish vessels was a joint operation of the flotilla and the army was founded on the existence of a general plan of campaign directed by Sir Stanley Maude, the general co-operation between the forces to which I have referred, the order or request to push on and inflict as much damage as possible, the cavalry attack on Nahr Kellah, and the fact that the *Basrah*, the largest of the captured vessels, had been, in the fighting before February 25, bombed from an army aeroplane. On the part of the flotilla, reliance was placed upon the arrest of the military advance at or below Nahr Kellah during and after February 26, and in the absence of any participation by land forces in the actual operation of capture. Reference was made for the Treasury to the description of the general scheme of operations by Sir Stanley Maude and Captain Nunn respectively as operations in which both the troops and the flotilla were engaged, and to the terms in which the General included the vessels as part of the spoils of war taken in the course of his advance.

Care is required in defining the exact grounds on which head money by way of prize bounty is awarded, and the

1921

MESOPOTAMIA OPERATIONS, 1917, *In the Matter of the.* THE SULMAN PAK, ETC.

The President.

character of the participation of land forces which suffices to prevent a capture from being attributed to naval forces in such a way as to entitle them to an award. Sect. 42 of the Prize Act, 1864, appoints the bounty of the Crown to "such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of Her Majesty's enemies." It is well settled —as was said by Lord Stowell with regard to an earlier statute, in *La Bellone* (1)—"that conjunct expeditions were entirely out of the statute with respect to both the services." To establish a joint capture, however, requires proof that both the forces concerned were in fact participants in the operation of capture. "The actual captor," Lord Stowell said in *The John* (2), "is the favourite of the law, and the Court will not suffer his interest to be affected but by evidence the most satisfactory. The onus probandi lies upon the party setting up the claim as joint captor, who, in order to establish it, must bring very clear proof in support of his case." Blockade by a squadron, or chase by a squadron, and capture by one ship of the squadron in the prosecution of the common enterprise; and presence upon the scene of a capture in readiness to assist; are instances in which the seizure by one vessel has enured for the benefit of her consorts. But, as was said by Sir William Grant in pronouncing the judgment of the Privy Council in *The Nordstern* (3), the question is "whether such a co-operation existed as to make the capture in question necessarily dependent and consequent thereon. . . . . It is not sufficient a joint enterprize shall exist at the time, except it expressly refer to the capture in question. . . . ." The judgment in *El Rayo* (4) shows that where two ships of war are in sight at a time of capture, a prize may be the prize of one of them if the act of capture was the independent act of that one.

The question, as it presents itself to me, is not whether the flotilla and the troops were on February 26, 1917, engaged in a joint scheme of operations, but whether the flotilla and

(1) 2 Dods. 343, 351.
(2) (1813) 1 Dods. 363.
(3) (1809) 1 Acton, 128, 135, 140.
(4) (1811) 1 Dods. 42.

the troops were engaged jointly in the capture of the Turkish ships, and I have come to the conclusion that the troops in fact took no part in the capture. I do not lay stress on the fact that the flotilla was under purely naval command; without unity of command there might have been joint action. The troops were in fact out of reach when the captures were made. The bombing of the *Basrah* by army airmen was not an incident of the capture. The flotilla got away past Nahr Kellah far enough and effectually enough to be able to act for itself, and without requiring or receiving help from land forces in the immediate enterprise it alone made the prizes in respect of which the bounty is claimed.

I find the facts correctly alleged in the affidavit of Captain Sherbrooke, R.N., filed in support of the claim: "The capture of the said armed vessels . . . . was solely effected by His Majesty's ship *Tarantula*, His Majesty's ship *Mantis*, and His Majesty's ship *Moth* . . . . no other ship or vessel or person being present or assistant thereat." My judgment, therefore, must be in favour of the claim, and the amount to be distributed is 7745*l.*

Solicitors for the claimants: *Woolley, Tyler & Bury.*

Solicitor for the Procurator-General: *The Treasury Solicitor.*

E. C. M. T.

C. A.
1921
Dec. 19.

[IN THE COURT OF APPEAL.]

THE RAN; THE GRAYGARTH.

Shipping—Collision—Tug and Tow in same Ownership—Negligence on the Tug—Limitation of Liability—Decree of Limitation on Tonnage of Tow—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.

The appellants' vessel was damaged through collision with a barge (the *Ran*) in tow of a tug. The collision was solely caused by the negligence of the persons on the tug which was in charge and had control of the navigation. The tug and the barge belonged to the same owners, Rea, Ld.

In an action in rem brought by the appellants against "the owners of the barge *Ran*" Hill J. entered judgment in personam against Rea, Ld., on the ground that they were liable as owners of the tug, and in the subsequent limitation action brought by Rea, Ld., pronounced for a decree of limitation of liability under s. 503 of the Merchant Shipping Act, 1894, on the tonnage of the tug:—

Held, reversing the decisions of the Admiralty Court: (i.) That the appellants were entitled to a judgment in rem against Rea, Ld., as the owners of the *Ran*, on the ground that she was negligently navigated by her owners' servants on board the tug; and (ii.) that accordingly Rea, Ld., could not limit their liability on the tonnage of the tug, but must bring their action for limitation based on the tonnage of the *Ran*.

Union Steamship Co. v. *Owners of the Aracan* (*The American and the Syria*) (1874) L. R. 6 P. C. 127 explained and distinguished.

Appeals (heard together) from a judgment of Hill J. in an action of limitation of liability and from the decree in the collision action out of which the limitation action arose.

The plaintiffs in the limitation action were Rea, Ld., the owners of the barge *Ran* and the steam tug *Graygarth*. The defendants (plaintiffs in the collision action) were the owners of the barge *Para* and of her cargo.

On October 29, 1919, while the *Graygarth* had in tow the *Ran* and two other craft in the River Mersey, the *Ran* was brought into collision with the laden barge *Para*. The *Para* sank, and her owners and the owners of the cargo suffered damage to the amount of about 3000*l*. By the judgment in the collision action Rea, Ld., were condemned in those damages. The decree in that action dated February 10, 1920, was in the following terms: "The judge doth pronounce the collision in question in this action to have been occasioned

by the fault or default of the master and crew of the tug *Graygarth* which was towing the barge *Ran*, and for the plaintiffs' claim for damages in consequence thereof; and doth condemn the said defendants, the owners of the said barge *Ran*, in the said damages and costs."

Accordingly, in the limitation action, Rea, Ld., sought a decree limiting their liability in accordance with s. 503 of the Merchant Shipping Act, 1894 (1), to 8*l.* per ton on the tonnage of the *Graygarth*. The owners of the *Para* and her cargo contended that Rea, Ld., were not entitled to so limit their liability, but were only entitled to limit it on the basis of the aggregate tonnage of the *Graygarth* and the *Ran*, or, alternatively, on the tonnage of the *Ran*. The tonnage of the *Graygarth* ascertained in accordance with the provisions of the Act represented 1131*l.* The tonnage of the *Ran*, similarly ascertained, represented about 3000*l.*

Hill J. in giving judgment in the limitation action said that the decree in the collision action was "a judgment in personam only against the persons who were the owners of the *Ran*—i.e., Rea, Ld. It did not condemn the *Graygarth* against which there was no writ in rem. It did not condemn the *Ran* or the bail. It found fault on the part of the master and crew of the *Graygarth* and therefore made it clear that Rea, Ld., were liable as owners of the *Graygarth*. It did not find fault with anybody on board the *Ran* and did not deal with the question whether Rea, Ld., were liable as owners of the *Ran* for fault of their servants on board the *Graygarth*. In my delivered judgment," continued his Lordship, "I said: 'I find fault on the part of the *Graygarth*, and therefore the owners of the *Ran* being also the owners of the *Graygarth* there must be judgment for the plaintiffs against the

(1) Sect. 503: "The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity . . . . (*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship, be liable to damages beyond the following amounts . . . . (ii.) in respect of loss of, or damage to, vessels, goods, merchandise . . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage."

C. A. 1921

THE RAN; THE GRAYGARTH.

defendants.' I might just as well have expressed it thus: 'I find fault on the part of the *Graygarth*, and the defendants who have appeared being owners of the *Graygarth* there must be judgment for the plaintiffs against the defendants.' Such being the judgment, the question whether Rea, Ld., as owners of the *Ran* were liable has never been decided. Whether it is open to the owners of the *Para* now to raise that question on a proper proceeding I say nothing about. But in this action Rea, Ld., are entitled to the relief for which they ask—viz., that their liability as owners of the *Graygarth* should be limited to 8*l.* per ton on the tonnage of the *Graygarth*. I shall make a decree accordingly."

The defendants, the owners of the *Para* and her cargo, appealed.

On July 14, 1921, the appeal in the limitation action came before the Court of Appeal when their Lordships, thinking that the question also arose as to whether a judgment in rem against Rea, Ld., as owners of the *Ran* ought not to have been pronounced, gave leave to the owners of the *Para* and her cargo to appeal against the judgment in the collision action, and the further hearing was adjourned.

Dec. 19. *Inskip K.C.* and *J. B. Aspinall* for the appellants. In the collision action the learned judge ought to have entered judgment in rem against the owners of the *Ran* and their bail. Rea, Ld., as the owners of the tug, are liable for the negligence of their servants who controlled the navigation and in fact negligently navigated the *Ran*: see *The Quickstep* (1) and *The Devonshire*. (2) "Improper navigation" is not confined to acts of negligence on board the vessel causing the damage: cf. *The Warkworth* (3); *The Umona*. (4) The only decision against the appellants' contention is *The American and the Syria* (5), but the facts in that case were exceptional. It is true that both the towing and the towed vessels belonged to the same owners, but in fact the towage was a voluntary

(1) (1890) 15 P. D. 196.
(2) [1912] A. C. 634.
(3) (1884) 9 P. D. 145.
(4) [1914] P. 141.
(5) L. R. 6 P. C. 127.

act on the part of the master of the towing ship and was outside the scope of his duty. The case therefore is distinguishable. If the decree in the collision action ought to have been a decree in rem against the *Ran*, it follows as a matter of course that the limitation proceedings should have been based on the tonnage of the *Ran* and not on the tonnage of the tug.

Dunlop K.C. and *Noad* for the respondents. The judgment in personam against Rea, Ld., was right, because they were the employers of the persons who were negligent on the tug. It is immaterial that Rea, Ld., happened to be the owners of the tow. The tow was not improperly navigated: cf. *The W. H. No.* 1 *and The Knight Errant.* (1) The decision in *The American and the Syria* (2) is directly in the respondents' favour; the observations of Sir Samuel Evans in *The Umona* (3) are obiter and had reference to quite different questions arising under the Maritime Conventions Act. In *The Warkworth* (4) the vessel herself was in fact faultily navigated, because she would not answer her helm. Sect. 503 of the Merchant Shipping Act contemplates limitation on the tonnage of the wrongdoing ship, which in this case was the tug.

[No reply was called for.]

LORD STERNDALE M.R. This case came before us during the last sittings on appeal from a judgment and decree in a limitation action. An action, which I shall call the collision action, had been brought by the owners of the barge *Para* and the owners of her cargo for damages sustained in consequence of the defendants' barge *Ran* negligently colliding with the *Para* in the Mersey. It was an ordinary action in rem against the owners of the *Ran*. The writ was issued on September 5, 1919, and on October 30 the defendants' solicitors gave an undertaking to provide bail. Bail in fact was not given until after the judgment, but that is, I think, a matter of every-day practice, and it must be taken as if

(1) [1910] P. 199; [1911] A. C. 30.
(2) L. R. 6 P. C. 127.
(3) [1914] P. 141.
(4) (1884) 9 P. D. 145.

C. A. 1921

THE RAN; THE GRAYGARTH.

Lord Sterndale M.R.

the bail was given at the time the undertaking was given. The indorsement upon the writ by the defendants' solicitors was: "We accept service herein, and we undertake in due course to give bail." The allegation in the statement of claim was that the plaintiffs "have suffered damage by reason of a collision between their barge *Para* and the barge *Ran*, which was solely caused by the negligent and improper navigation and/or management of the *Ran* and/or her tug or the flotilla of barges in which she was by the defendants or their servants." It appeared that the *Ran* with a number of other barges was in tow of the tug *Graygarth*, and the *Graygarth* belonged to Rea, Ld., the owners of the *Ran*. Whether they were the owners of the rest of the flotilla of barges I do not know, and it is immaterial. The action having been brought against the owners of the *Ran*, they, as represented by their bail, could only be responsible if the *Ran* was improperly navigated and such improper navigation caused the collision. As owners of the *Graygarth* they might be liable also, but in the action in which they were sued as owners of the *Ran* they could only be responsible if the *Ran* was improperly navigated. The learned judge found that the plaintiffs' barge and her tug were not to blame, and that the *Ran* was not to blame so far as those on board her were concerned. There were one or more persons on board the *Ran*, which was abreast of another barge, and all the navigation she could possibly do was to follow the tug. The learned judge has found that by negligent navigation the *Ran* was brought into collision with the *Para* and has held the defendants responsible for that negligence; but he has held them liable, because they were owners of the tug, and therefore the persons on board the tug and navigating her and also navigating the flotilla of barges, of which the *Ran* was one, were their servants.

The decree, which was approved by the solicitors on both sides, appears to me to be in rather an odd form, because the learned judge says he meant it, not as an ordinary judgment in rem against the defendants as owners of the *Ran*, but as a judgment in personam against them, because the persons on the *Graygarth* were their servants. The decree is as follows:

"The judge doth pronounce the collision in question in this action to have been occasioned by the fault or default of the master and crew of the steam tug *Graygarth* which was towing the barge *Ran* and for the plaintiffs' claim for damages in consequence thereof. And doth condemn the said defendants, the owners of the said barge *Ran*, in the said damages and in costs." Now this condemnation of the defendants had nothing to do with them as owners of the *Ran*, and I cannot understand why the words "the defendants, *the owners of the barge Ran*," were put into the decree; but the learned judge states what his intention was, and I take that to be the meaning of the decree.

Following upon the decree in the collision action, the defendants in that action, Rea, Ld., began a limitation suit asking that their liability should be limited to the amount of 8*l.* per ton on the tonnage of the *Graygarth*. Their contention was that there was no judgment against them in respect of any improper navigation of the *Ran*, that the ship which was improperly navigated and caused the damage was the *Graygarth*, and therefore that the *Graygarth* was the ship according to which their liability ought to be measured under s. 503 of the Merchant Shipping Act. That was the position when the case first came before us, and as we thought the form of the decree was curious and to a certain extent embarrassing, and there was a serious question as to whether the judgment that ought to have been given was not a judgment in rem against the owners of the *Ran* and their bail, we gave leave to appeal against the judgment in the collision action. In order that the case might not go back for a new trial, on the first hearing before us the following admissions were made: "That there was no personal negligence by anybody on board the *Ran*; that the collision damage was caused by the negligence of those on board the tug or some of them; that the barge and the tug belonged to the same owners; and that the control of the navigation of the tug and the flotilla of barges was in the tug." We have heard the appeal on these admissions and on what appears in the learned judge's judgment.

C. A. 1921

THE RAN; THE GRAYGARTH.

Lord Sterndale M.R.

In my opinion the judgment as given was wrong. There ought to have been judgment against the owners of the *Ran* and their bail in the ordinary way on the ground that the *Ran* was improperly navigated and that the defendants were responsible for that improper navigation. In that case of course the *Ran* and not the *Graygarth* would be the ship according to which the defendants' liability would be measured. The question of the liability of tug and tow always raises the issue as to whether the persons on the tug, where the tug is negligent, were the servants of the owners of the tow. Butt J. said in *The Quickstep* (1): "The real question is whether or not the relation of master and servant exists between the defendants, the owners of the vessel towed, and the persons in charge of the navigation of the steam tug," and he cited with approval the decision of an American judge who points out that even if the crew of the tow were on board it makes no difference if the master and crew of the tow are not expected to participate in the navigation of the vessel. In the present case it is quite clear that those on board the tow were not participating in the navigation and that the navigation was controlled by the tug. What then is the position where the tug and tow belong to the same owners? In my opinion the tow is improperly navigated by the servants of the owners of the tow, although these servants may be upon the tug. It does not matter where they are. If they are the servants of the owners of the tow, and they are navigating the tow, the owners of the tow are liable for the negligence of the tow, and that is the vessel they are improperly navigating. The tug may be improperly navigated, but that does not prevent the tow being also improperly navigated. I think that is the result of *The Quickstep* (2) and *The Umona*. (3) In the latter case it may be that the statement was obiter, but there was a distinct statement of the opinion of Sir Samuel Evans. It seems to me that it obviously must be so. If you have got a vessel in tow, and she is improperly navigated by your servants

(1) 15 P. D. 196, 199. (2) 15 P. D. 196.

(3) [1914] P. 141.

C. A. 1921

THE RAN; THE GRAYGARTH.

Lord Sterndale M.R.

who are in control of the navigation, it does not matter where they are, you are responsible for their improper navigation. I should have thought that was quite clear on principle, and I think it is clear on authority. I think it is shown by *The Devonshire* (1) in the House of Lords and by what I have read from *The Quickstep*. (2)

But there is said to be a decision to the contrary, a case which is always cited as *The American and the Syria* (3), although that is not its correct citation. In that case the circumstances were peculiar. The *Syria* was a disabled vessel. The *American* was a ship belonging to the same owners, and without any orders from the owners or any request by the master of the *Syria* the *American* took the *Syria* in tow. While in tow an accident happened and both vessels came into collision with a sailing ship. The Privy Council held that the owners of the *Syria* were not responsible for the negligence of those on board the *American*. I doubt however if the question whether the owners of the *Syria* were not responsible, because those on board the *American* were their servants, was present to their minds. What they were concerned with was the question as to which of the vessels was in control of the navigation; but they did in fact refer to the very special circumstances under which the *American* took the *Syria* in tow. After going through a number of cases they said: "The master of the *American* appears to have undertaken to tow the *Syria* under circumstances quite exceptional. Their Lordships collect that he determined to take home the *Syria*, partly because he thought it his duty to his employers, who owned both vessels, partly with a view to obtain salvage from the owners of the *Syria's* cargo (which he succeeded in doing). There is no evidence of his having been hired by the captain of the *Syria*, or having acted in any way under the captain of the *Syria's* control. On the contrary, it would appear that the 'governing power' was wholly with the *American*." That case has been cited in *The Quickstep* (2) and in *The Devonshire* (1), and in the latter case Lord Atkinson,

(1) [1912] A. C. 634.
(2) 15 P. D. 196.
(3) L. R. 6 P. C. 127, 133.

C. A. 1921

THE RAN; THE GRAYGARTH.

Lord Sterndale M.R.

who was the only one who referred to *The American and the Syria* (1), said that the ground of the decision was that there was no evidence of the *American* having been hired by the captain of the *Syria* or having acted in any way under his control. I do not know whether or not that was right on the facts, but I think it is the explanation of that judgment. If it be not the explanation, then the judgment is contrary, in my opinion, to the principles laid down in the House of Lords some years afterwards in *The Devonshire*. (2) I think it is the explanation which was taken to be correct by the House of Lords, and therefore in my opinion *The American and the Syria* (1) does not prevent us from following what I think is the ordinary and logical rule and saying that this collision and damage was occasioned by the improper navigation of the *Ran*, and that this improper navigation was that of the servants of the owners of the *Ran*, although they happened to be on board another vessel.

I think the judgment should have been an ordinary judgment in rem against the owners of the *Ran* by reason of the improper navigation of the *Ran* through the acts of the defendants' servants on board the *Graygarth*, and therefore that the *Ran* and not the *Graygarth* is the vessel in relation to which liability should be limited under s. 503 of the Merchant Shipping Act. The appeal, therefore, should be allowed in the collision action in accordance with what I have said. It follows that the limitation action based on the tonnage of the *Graygarth* is wrong and that the appeal against the decree in that action also succeeds. The appellants will have the costs of both appeals and the costs of the limitation action.

ATKIN L.J. I agree. [His Lordship stated the facts and continued:] It appears to me, with great respect, that the judgment of Hill J. was wrong, because I think that on the findings of fact he ought to have found that the *Ran* was to blame, and ought to have condemned the bail of the *Ran* on the ground that the *Ran* was improperly navigated by the

(1) L. R. 6 P. C. 127. (2) [1912] A. C. 634.

servants of the owners—namely, the persons who were navigating the tug. Clearly, the *Ran* was being navigated by those on board the tug, and it appears to me under those circumstances that the plaintiffs ought to be upheld in their allegation in the statement of claim that the *Para* was damaged by the wrongful navigation of the *Ran* by the servants of the defendants. I think the principle is sufficiently established by referring to the cases. Although in *The Quickstep* (1), and I think in *The Devonshire* (2), the ultimate decision was to absolve the owners of the tow, the principles laid down, it seems to me, expressly support what I have said as being the true rule of law to apply. I will only repeat the passage quoted by Butt J. in *The Quickstep* (1) from the judgment of the Supreme Court of the United States in *Sturgis* v. *Boyer* (3): "Whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels." Then he says: "Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, the tow under the circumstances is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel." That passage is quoted with approval by the Divisional

(1) 15 P. D. 196. (2) [1912] A. C. 634.
(3) (1860) 24 Howard's Rep. 110.

C. A. 1921

THE RAN; THE GRAYGARTH.

Atkin L.J.

Court and it seems to me to be sound, with the qualification, that the master and crew of the tow are not expected to participate in the navigation of the vessel at the stage at which the collision took place. Subject to that the decision would appear to state that there may be circumstances in which the tow, whether or not she has got persons on board her, is being navigated by the tug, and under those circumstances if she is navigated so as negligently to damage another vessel, then it seems to me that it is the tow that is being improperly navigated, and the only question then arising is whether the defendants. the owners of the tow, are responsible for that improper navigation. That will depend on whether or not those on board the tug are or are not the servants of the owners of the tow to navigate the tow, and they may be so because they are in the ordinary position in which there are a skilled crew on the tow and the tug has to obey their orders. But the facts may be otherwise. There may be nobody on the tow to direct her, but the tug is provided by the owners of the tow under such circumstances that the crew of the tug are in fact the servants of the owners of the tow. Under those circumstances it appears to follow logically and necessarily that the improper navigation which, ex hypothesi, is that of those on board the tug who are improperly navigating the tow, is the improper navigation of the servants of the owners of the tow for which the owners of the tow are responsible. That seems to me to establish the liability. The passage in Lord Atkinson's judgment in *The Devonshire* (1) accepts that view, because in setting out the effect of *The Quickstep* (2) he says: "It was laid down in the judgment of the Court that the real question on which the liability of the tow in such cases depends is whether or not the relation of master and servant existed between the owners of the tow and the persons in charge of the tug." In the present case there is no dispute that this relationship did in fact exist, and it appears to me to follow that the tow was being improperly navigated by the servants of the owners of the tow.

(1) [1912] A. C. 634, 654. (2) 15 P. D. 196.

C. A. 1921

THE RAN; THE GRAYGARTH.

Atkin L.J.

I agree that in *The American and the Syria* (1) a similar question might have arisen. It appears to me that the judgment of the Privy Council was rather directed to the question whether, there being a master and crew on both vessels, the master and crew of the tow were in fact directing the master and crew of the somewhat smaller vessel that took her in tow for salvage purposes; and I do not think it was directed to the point as to the identity of ownership so as to make the servants of the towing vessel the servants of the owners of the tow. But if the decision cannot be distinguished on those lines, as suggested by the Master of the Rolls, I think it is plainly my duty to follow the decision in *The Quickstep* (2) as affirmed by the House of Lords in *The Devonshire* (3), a decision which is, I think, supported also by the weighty authority of Sir Samuel Evans in *The Umona.* (4)

For these reasons I think that the plaintiffs were right in bringing their action in rem against the *Ran*, and I think they ought to have had a decree giving effect to it. It appears to me that in substance the notice of appeal asks for the right order, except that I am not sure that it is right to ask for a pronouncement that the collision was occasioned by the fault or default of the owners or their servants. That might lead to trouble on the limitation suit as to the actual fault or privity of the owners. I think it would be sufficient to say: "By pronouncing the collision in this action to have been occasioned by the fault or default of the servants of the owners of the barge *Ran* and their servants the crew of the steam tug *Graygarth* in the navigation of the *Ran*, and by pronouncing for the plaintiffs' claim for damages in consequence of the improper navigation of the barge *Ran* and condemning them in the said damages and costs." I think that is the proper order. If that decree had been made, as I think it ought to be made, it follows, as admitted by Mr. Dunlop, that the limitation suit must fail. I agree therefore that the appeal should be allowed in that case also.

(1) L. R. 6 P. C. 127.
(2) 15 P. D. 196.
(3) [1912] A. C. 634.
(4) [1914] P. 141.

C. A. 1921

THE RAN; THE GRAYGARTH.

YOUNGER L.J. I am of the same opinion. I confess that *The American and the Syria* (1), both as reported before Sir Robert Phillimore and in the Privy Council, causes me some trouble, but I think the case should be distinguished from the present on the ground mentioned by my Lord.

Appeals in both actions allowed.

Solicitors for the appellants: *Pritchard & Sons, for Collins, Robinson & Co., Liverpool.*

Solicitors for the respondents: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

E. C. M. T.

C. A. 1921 *Dec.* 14, 15.

[IN THE COURT OF APPEAL.]

THE JOANNIS VATIS.

Shipping—Collision—Action by Shipowners as Bailees of Cargo—Non-assenting Cargo-Owners—Rights against Bail—Distribution of Fund.

The steamships *W. H.* and *J. V.* came into collision and the *W. H.* and her cargo were damaged. Before the issue of the writ an undertaking to put in bail to the amount of 100,000*l.* had been given on behalf of the owners of the *J. V.* The writ was in the names of "The owners of the steamship *W. H.* and cargo *v.* the owners of the steamship *J. V.*," but at that time no authority from any of the cargo owners had been received. While the litigation was proceeding the owners of the *W. H.* asked the various underwriters on the cargo (subrogated to the rights of the respective cargo owners) to join in the proceedings or share in the costs. Some assented and some declined. The litigation proceeded to the House of Lords, where the *J. V.* was held alone to blame.

The sum of 100,000*l.* being insufficient to satisfy all the claims, the owners of the *W. H.* contended that having sued as owners of the ship and bailees of the cargo they were entitled to receive the whole of the bail for which the undertaking had been given, pay themselves the amount of their own damage as shipowners in priority to all other claimants, and that the non-assenting cargo owners had no right to share in the fund:—

Held, that although, as bailees of the cargo, the shipowners were entitled to recover the full value of the damage to the cargo (represented by the bail), they must account to all the owners of the damaged parcels

(1) L. R. 6 P. C. 127.

of cargo for their share; and that it was the duty of the Court, when the bail was recovered, to see that all persons having a claim on the fund, including the non-assenting cargo owners, shared in the distribution.

Judgment of Hill J. affirmed.

C. A. 1921

THE JOANNIS VATIS.

APPEAL from a decision of Hill J. confirming the report of the registrar on a reference to assess damages.

The facts were as follows: In August, 1917, a collision took place between the British steamship *Worsley Hall* and the Greek steamship *Joannis Vatis* in the Mediterranean. Both vessels put into Bizerta. Each threatened to arrest the other. Those arrests, if made at Bizerta, would have been governed by French law, and the limit of liability would have been the value of the ship. Accordingly negotiations ensued and each party gave an undertaking to provide bail in 100,000*l.*, or the value of the steamer, whichever should be less, and agreed to proceedings in the Admiralty Court in England, and each accepted the writ in rem issued by the other. The writ issued by the plaintiffs was in the name of "The owners of the steamship *Worsley Hall* and cargo." At the date of the issue of the writ the only authority to sue was that given by the owners of the *Worsley Hall.*

In pursuance of the undertaking to put in bail a bail bond in the usual form was executed on March 19, 1918. The cross-actions proceeded to trial, and ultimately the House of Lords, affirming the decision of the Court of Appeal, held the *Joannis Vatis* solely to blame, pronounced for the plaintiffs' claim, and referred the damages to the registrar. By a clerical error the decree as drawn up condemned the defendants but not their bail. While the action was proceeding, the average adjusters wrote to various underwriters on the cargo of the *Worsley Hall* asking if they would "join the owners of the ship in the collision proceedings." Some companies agreed to do so but others refused. When it became apparent that the 100,000*l.* was insufficient to satisfy all claims in full, Messrs. Hill, Dickinson & Co., the solicitors for the *Worsley Hall*, wrote to the non-assenting underwriters that as they had not agreed to share the burden of the proceedings against the *Joannis Vatis* they were "not

C. A. 1921

THE JOANNIS VATIS.

entitled to the benefit of the bail obtained." At the reference the defendants did not appear, having no further interest in the matter, the amount of the bail being considerably more than the limit of their statutory liability, and the parties represented were the owners of the *Worsley Hall* and the assenting and non-assenting underwriters.

The registrar reported that there was "due to the plaintiffs in respect of their claim the sum and interest as stated in the schedule." The schedule gave the figures: "Claim of owners of the *Worsley Hall* 61,518*l.* 14*s.*, and the cargo 181,487*l.* 2*s.* 2*d.* making a total of 243,005*l.* 16*s.* 2*d.* From this amount there has to be deducted the sum of 96,052*l.* 1*s.* 2*d.*, the amount realized by the sale of the damaged cargo."

In the reasons for his report the registrar said that he decided that the non-assenting underwriters were entitled to share in the 100,000*l.*

The owners of the *Worsley Hall* and the assenting cargo underwriters moved in objection to the report.

Hill J. in the course of his judgment said that if there were no fund in Court and no right of intervention on the part of the non-assenting underwriters the shipowners' contention would appear to be sound. It was therefore necessary to determine whether the plaintiffs were right in contending that there was no fund in Court. "In my view" (said his Lordship) "they are wrong. It is true the ship was at Bizerta and was not under arrest of this Court, nor capable of being properly arrested by this Court. But the agreement was to give bail in this Court, and bail was given in this Court. The effect was that, as regards the claim for which bail was given, the bail took the place of the ship. It is much more common for an undertaking for bail to be given to prevent arrest than for bail to be given after arrest. That is contemplated by Order IX., r. 10: 'In Admiralty actions in rem no service of writ or warrant shall be required where the solicitor of the defendant agrees to accept service and to put in bail, or to pay money into Court in lieu of bail.' . . . . . By giving bail the defendants saved the *Joannis Vatis*, if she came within the jurisdiction, from arrest. It is said

that in this case the bond is merely a personal contract of suretyship between the owners of the *Worsley Hall* and the sureties. In my view, however, it is equivalent to the res or to a fund in Court produced by the sale of the res, and it remains therefore to consider whether the non-assenting underwriters had any right to intervene and claim an interest in it. By Order XII., r. 24 : 'In an Admiralty action in rem any person not named in the writ may intervene and appear as heretofore, on filing an affidavit showing that he is interested in the res under arrest, or in the fund in the Registry.' I take that to apply to a case where bail has been given. The bail is the equivalent of the res or of a fund in the Registry.

"That leaves only the question whether upon the facts proved the non-assenting underwriters were interested in the fund. The owners of the *Worsley Hall*, as they informed the cargo owners on August 27, 1917, obtained bail 'to include claims for loss of cargo as well as for damage to ship, and G. A. expenses.' They did not then say they had obtained it as bailees of cargo only. Either they did or did not obtain the bail to include claims for loss of cargo. If they did, the cargo owners, the assenting underwriters and non-assenting underwriters alike, are all interested in the fund. If they did not, they cannot be heard to say that they did not, for they never withdrew or qualified that representation until after the period had expired within which cargo owners could as of right bring an action against the owners of the *Joannis Vatis*. It is quite true that they invited the cargo owners to participate in the litigation, or the costs of it ; but it was not until after the limitation two years had run out that they informed the non-assenting underwriters on July 28, 1920, that the bail was not obtained for them. In the meantime the non-assenting writers had altered their position, for they had continued to act on the basis that their claims would rank against the bail, instead of taking any steps to recover their own damages by separate action.

"In my judgment both the non-assenting underwriters and the assenting underwriters were entitled to intervene at any time up to final judgment. And final judgment will not

C. A. 1921

THE JOANNIS VATIS.

be until the report is confirmed: *The Duke of Buccleuch.* (1) When they intervene they must take the recovery as they find it. The first charge upon the 100,000*l.* will be the shipowners' costs of recovery, so far as they have not been paid by the defendants. But in the balance the non-assenting underwriters are, in my judgment, entitled to participate. In principle, the result is only what would have followed if no bail had been obtained in respect of cargo and after judgment in an action in respect to the ship alone, the owners of the *Joannis Vatis* had obtained a decree of limitation, and paid the limited amount into Court. Under a decree so made all the cargo owners would have been entitled to appear and become parties to the limitation action, and to file claims."

Aspinall K.C., *Dunlop K.C.* and *Alfred Bucknill* for the appellants, the owners of the *Worsley Hall* and the assenting underwriters on her cargo. The judge was wrong in deciding that the non-assenting underwriters could intervene under Order XII., r. 24. That rule contemplates an action against the res, where the bail or the proceeds of sale are in Court. An undertaking to provide bail cannot be likened to a fund in Court, and even if bail is the equivalent of the res, the Order merely gives the right to intervene, and nothing more. In the present proceedings the appellants alone have the right to recover the sum of 100,000*l.* The case is distinguishable from *The Africano* (2), where the vessel had been sold and the proceeds were in Court. Here there is merely a personal contract of suretyship. The appellants have recovered a personal judgment against the defendants, and there is no res in which the non-assenting underwriters have any interest.

[SCRUTTON L.J. referred to *The Glamorganshire.* (3)]

In the present case the non-assenting underwriters refused to join in the action, they are not therefore bound by the judgment and ought not to share in its results. The appellants have two distinct rights of action. Apart from the question of limitation of liability, they are entitled as against

(1) [1892] P. 201. (2) [1894] P. 141.
(3) (1888) 13 App. Cas. 454.

the owners of the *Joannis Vatis* to the full amount of the damages in personam: *The Dupleix* (1), although the sureties are only liable for 100,000*l.*; and there should be judgment (*a*) for 61,518*l.*, the amount of the damage sustained as shipowners, and (*b*) for 122,000*l.*, the amount of the damage sustained as bailees of the cargo: see *The Winkfield*. (2) As bailees the appellants can put forward such cargo claims as they choose—namely, those of the assenting underwriters.

[*The Marpessa* (3) was also referred to.]

Stephens K.C. and *Balloch* for Liverpool non-assenting underwriters, and *Raeburn K.C.* and *R. F. Hayward* for London non-assenting underwriters, were not called on.

BANKES L.J. The short point raised on this appeal is whether a person, who has sued as owner of a vessel and cargo and has established the liability of the defendant to pay damages in respect of ship and cargo, can shut out certain cargo owners from any share in the benefit of that judgment, because they elected not to take their share, or because they refused to take their share, in the expenses connected with establishing the liability. That really is the issue, although it seems to have been decided in rather an irregular and informal way; but I think the decision was asked for by all parties, and it was right that the learned judge should have decided the point under the circumstances in which it was brought before him. [His Lordship stated the facts and continued:] The position of the plaintiffs was that they were owners of the *Worsley Hall* and had a right, therefore, to maintain an action for damages in that capacity. They also claimed as owners of the cargo. They were not in fact owners of the cargo; they were merely bailees of the cargo, but as bailees they had a right of action against the wrongdoer, and the measure of the damages would be the value of the cargo or, of course, if they desired it, and if they had some special cause of action as bailees, they might have limited their claim

(1) [1912] P. 8. (2) [1902] P. 42.
(3) [1891] P. 403.

C. A. 1921

THE JOANNIS VATIS.

Bankes L.J.

either in the indorsement on the writ or in the statement of claim to a limited claim—not a claim to the value of the cargo, but a limited claim to some damage to themselves by reason of the damage to the cargo. But they did not take that course. The action proceeded and continued to the end with the full claim for damages as bailees of the whole of the cargo. No amendment was ever made to the writ; no limitation was ever included in the statement of claim, and the action began and continued in that form. Certain of the underwriters did not agree to join in the action, in the sense that they did not agree to pay any of the expenses; but they never agreed to withdraw from the action. They never agreed that their claims were not included in the action. Their position was: "We are not prepared to allow our claims to be put forward by Messrs. Hill, Dickinson & Co., nor are we prepared to pay part of the costs of the action, but we insist upon our right to bring in our claims in this action by our own solicitors." I gather that from a letter of February 26, 1921, in which Messrs. Hill, Dickinson & Co. wrote to Messrs. Thomas Cooper & Co., who were the solicitors representing some of the non-assenting underwriters, in these terms: "As you know, Messrs. Weightman, Pedder & Co. took over the claims of certain of the underwriters who did not consent to join in the legal proceedings and you represent other underwriters on cargo who took up the same position. We suggested without prejudice to this question that all the claims should be assessed and the point subsequently dealt with by the judge, and you assented to this course, but Messrs. Weightman, Pedder & Co. did not. We accordingly handed them the papers relating to the claims of the underwriters who had consulted them and they have been separately filed through Messrs. Botterell & Roche. . . . . We intend at the reference to object to the claims represented by Messrs. Botterell & Roche on the ground that the parties interested in putting forward the claims declined to ratify the proceedings which had been taken on their behalf by the shipowners. As your clients are in the same position we shall take the same point, but we think the proper course will be to agree, as we did with

you, that all claims should be assessed by the registrar without prejudice to this question and it can then be afterwards decided." That seems to me to have been a most reasonable proposal.

The matter then came before the registrar. He was directed by the order of the Court of Appeal, which had been affirmed by the House of Lords, to ascertain the damages which the defendants were liable to pay to the plaintiffs, suing in the capacity in which they were suing, and the only way in which he could do that was to ascertain the proper amount of the claims which were brought before him. Those claims were the claim of the shipowners, the claim of the people who were called the assenting underwriters, and the claim of the people who were called the non-assenting underwriters. At the reference, as one would expect, the question was raised which had been raised in Messrs. Hill, Dickinson's letter, although it was suggested the matter should not come up for decision till the matter came before the judge. But it was argued by counsel, and the registrar was apparently invited to come to a decision, as to whether the plaintiffs had any right to exclude the non-assenting underwriters from presenting their claims, and the registrar decided that the plaintiffs had no such right. The plaintiffs moved by way of objection to the registrar's report, and it would seem from the notice of appeal that the only point to which objection was taken was that the registrar had said that the non-assenting underwriters were entitled to participate. There is a long notice of appeal, but I think the substance of it is contained in this paragraph: "That the owners of the *Worsley Hall* and the assenting underwriters were entitled to the full fruits of the bail and judgment which they obtained at their own risk and expense and they ought not to be deprived thereof by the non-assenting underwriters who deliberately elected not to join in the action."

When the matter came before the learned judge he found ground for supporting the registrar's view by referring to Order XII., r. 24, of the Rules of the Supreme Court, and saying that in his view these non-assenting underwriters had a right

C. A. 1921

THE JOANNIS VATIS.

Bankes L.J.

under the circumstances of this case to intervene. But it does not seem to me necessary to decide the case on those grounds, or to look at the matter from any other point of view than what the position of the plaintiffs was. It is true it was not a representative action in the ordinary sense of the word, but it was a case of persons who were claiming as bailees—and they were bailees—the full value of all the cargo on this vessel, and saying at the same time: "When we get the money, which is limited to 100,000*l.*, which is not sufficient to meet all claims, we intend to pay it over to a certain class of cargo owners and to exclude the other class, because they would not help us by sharing in the expenses of the litigation which was necessary to establish the liability." In my opinion, when once that fact comes to the knowledge of the Court, it is the Court's duty to stay the distribution of this fund until the rights of the parties have been established and until it has been determined whether or not the plaintiffs had the right they claimed; and that is really in substance what happened. Mr. Butler Aspinall and Mr. Dunlop have argued that they are entitled to a judgment, and that it must be left to some future occasion to decide what is to be done with the money. That would be so, it seems to me, but for the fact that from the time the question first arose it has always been treated between the parties as a matter that had to be decided by the judge after the registrar had reported upon the amount of the damages. In my opinion the Court should treat this question as though with the assent of the parties the judge was asked to decide how this money had to be distributed, and to decide it at the same time as he either affirmed or rejected the registrar's report.

Now all the registrar has done is to decide, for the reasons he has given in his report, that the non-assenting underwriters were entitled to participate, and, having done that, all he reports is that the claim of the owners of the *Worsley Hall* has been allowed at 61,518*l.* odd, and the claim of the cargo owners at 181,487*l.* odd, and that from this amount has to be deducted 96,000*l.* odd, the amount realized by the sale

of the salved cargo. I do not think he professes to deal with the question as to which of the cargo owners' claims must be considered in reference to the amount to be deducted. He leaves that to be dealt with by the persons who have charge of this matter on behalf of all the cargo owners, and he does not in terms, as it seems to me, decide that as between the persons entitled to share in this fund that the amount is to be distributed pro rata. When the matter came before the learned judge he affirmed the registrar's view that the non-assenting underwriters were entitled to participate. I do not think he in terms says that the amount is to be distributed pro rata. What he says is: "When they (the non-assenting underwriters) intervene they must take the recovery as they find it." Then he does say this: "The first charge upon the 100,000*l.* will be the shipowners' costs of recovery, so far as they have not been paid by the defendants But in the balance the non-assenting underwriters are, in my judgment, entitled to participate," and it is, as it seems to me, from that point only that the appeal to this Court is made. But it is said that in the Admiralty Court a judgment such as the learned judge has now pronounced is a decision that the cargo owners and the shipowners will participate rateably. I assume it is, and I see no reason to think that that view is wrong. That is not appealed from, but Mr. Dunlop has contended that it has not yet been decided, or that it ought to be decided hereafter. If however that is the correct view of the learned judge's judgment, I see no reason to doubt that that part of it is right as well as the part in which he agrees with the registrar, and I will only in conclusion refer to this sentence in the judge's judgment, which seems to me to sum up the result. He says: "In principle, the result is only what would have followed if no bail had been obtained in respect of cargo and after judgment in an action in respect to the ship alone, the owners of the *Joannis Vatis* had obtained a decree of limitation, and paid the limited amount into Court. Under a decree so made, all the cargo owners would have been entitled to appear and become parties to the limitation action, and to file claims." In other words,

C. A. 1921

THE JOANNIS VATIS.

Bankes L.J.

it is not the practice of the Admiralty Court to allow money to be distributed until the claims on the money have been dealt with. That seems to me to be what was done in *The Glamorganshire* (1) and I think it is right. I see no reason whatever to interfere with the course taken by the learned judge, and this appeal must be dismissed.

SCRUTTON L.J. I agree that this appeal must be dismissed, but, as these proceedings are a little complicated, I think it is best to express my judgment in my own way. The exact point on the notice of appeal which we have to decide is, as I understand, whether certain persons described as non-assenting underwriters—which is commercially accurate but technically quite wrong, because the Admiralty Court has nothing to do with underwriters—whether the cargo owners to whose rights the underwriters were subrogated have any right to share pari passu in the sum of 100,000*l.*, which sum was received from certain persons who have given a bail bond. I mention that as the only point to be decided, because Mr. Dunlop has raised a number of other points which are not in the notice of appeal, and which I am not purporting to decide, though I have a strong opinion on some of them.

The case arises in this way. [His Lordship stated the facts.] The question is, amongst whom is the bail in 100,000*l.* to be divided ? In my view the bail, when recovered, would be a substitute for the res. I am not expressing any opinion as to whether it would be possible to enter personal judgment against the owners of the Greek ship for the amount of the damages which the registrar has found, or as to what steps the owners can take to limit their liability at all. But obviously the question will arise as to how this 100,000*l.* is to be divided. In my view the practice of the Admiralty Court has been and should be that when it has a fund under its control it should take care that it is divided among all the proper claimants on the record, and it should not let the fund be paid out to any party until it has been seen that all people

(1) 13 App. Cas. 454.

who may properly claim on the fund have put forward their claims, or have had an opportunity of putting forward their claims.

I referred during the argument to the opinion expressed by the Privy Council in *The Glamorganshire* (1), which seems to me to confirm what I have stated. In that case the owners of the cargo sued. Their interest was as shippers under a bill of lading which they had pledged for nearly the value of the goods with a bank, and the bank was not a party. What was the Court to do with the fund, when recovered? The Privy Council said "that the plaintiffs have an interest to maintain the suit to recover the money"—that is the whole of the money—"for the benefit of those persons who on inquiry are proved to be entitled to it, and under circumstances in which the money will not be paid out till the owners of the *Glamorganshire* are completely freed from all claims." That is to say, the money must be so appropriated that the defendants are not to be hit by further claims; and in my opinion the money must be so appropriated that no persons who have a claim on the fund can be shut out from sharing it.

What is the interest of the plaintiffs in this cargo? It is correctly said that they have a right to sue as against the wrongdoer for the full amount as bailees. That follows from the decision in *The Winkfield*. (2) The leading authority cited in that case is the judgment of the Court of Common Pleas in *Turner* v. *Hardcastle* (3): "The defendant is a mere wrongdoer, having no right either under Cooke, the mortgagee, or any one else. The defendant, therefore, is liable to the plaintiffs for the full value of the goods; and the plaintiffs are liable to Cooke for his proportion." That is to say, in this case the plaintiffs would be entitled to recover the full value of the cargo against the wrongdoers, but would have to account over and would be liable to the owners of the cargo for their proper share. I express no opinion as to what their proper share is, because Mr. Dunlop has some point

(1) 13 App. Cas. 454, 467. (2) [1902] P. 42.
(3) (1862) 11 C. B. (N. S.) 683, 708.

C. A. 1921

THE JOANNIS VATIS.

Scrutton L.J.

about general average, which I have not quite understood, and I did not think it was necessary to follow it up.

If I understand the figures correctly the ship put in a claim which the registrar assessed at the sum of 61,518*l.*; the solicitors for the plaintiffs put in cargo claims which were assessed at 163,000*l.* odd, and that 163,000*l.* included a large percentage of claims by underwriters who had assented and were ready to bear their share of the costs, and some proportion of underwriters who had not assented—the reference does not distinguish which. But the registrar stated that against the total of 181,000*l.* 96,000*l.* would have to be deducted as the value of the cargo salved and sold as damaged. He did not in any way apportion to which claims that salved cargo related. While, therefore, as against the fund it would reduce the amount claimed, as between the claimants the registrar's report did not in any way state what was the amount payable to each claimant. It is not quite clear exactly what happened at the reference. As between some parties there had been a sort of agreement beforehand that the judge was to determine who was to share. Other parties did not agree to that. Then apparently in some way the point was taken before the registrar that certain non-assenting underwriters were not entitled to share in the 100,000*l.* at all, and the registrar gave a formal report, saying: "I find that there is due to the plaintiffs in respect of their claim the sum and interest as stated in the schedule." The formal report does not in any way decide the point which is the subject of this appeal. The registrar, however, gave some reasons for his report, which undoubtedly show that in his view, though it is not included in the formal report, he was deciding that the non-assenting underwriters were entitled to share in the 100,000*l.* Thereupon the shipowners appealed to the judge, and one of their reasons is that which has been read by my Lord, that the owners of the *Worsley Hall* and the assenting underwriters were entitled to the full amount of the bail, and that the registrar was wrong in including the non-assenting underwriters. The learned judge dismissed the appeal, and the view he seems to have taken was that on the 100,000*l.*, when

recovered, the first charge would be the cost of recovery—which would be natural for a bailee accounting for a sum—but in the balance the non-assenting underwriters were in his view entitled to participate. It is against that part of the order declaring that the non-assenting underwriters were to be allowed to share in the 100,000*l.* that the appeal is brought, and that is the point we have to decide.

In my opinion it should be decided against the shipowners on the ground that it is the duty of the Court, when by its process a sum has been recovered in the Admiralty, to see that it goes to the persons entitled to claim. It is the same principle in my view as is stated in *The Glamorganshire* (1), and it appears to be a principle which does justice between the parties concerned. When I heard Mr. Dunlop argue that the money should be paid to his clients, the shipowners, and that then they would first appropriate the whole to their claim and the cost of recovery, and then leave any balance to be divided, leaving the non-assenting underwriters out in the cold, it struck me as so manifestly unjust that if it were not already the practice of the Admiralty Court it was desirable it should be made its practice as soon as possible. But in my view it is the practice of the Admiralty Court, when it recovers a sum in lieu of the res, to see that all persons having a claim on the fund have the amount divided between them, and in my present view, though I have not heard the matter fully argued, it should be divided between them pari passu. Further than that I do not express any opinion, but I certainly must not be taken as giving any assent to the idea that the shipowner's claim for damages is to be alone first considered, and that the cargo owners are only to come in when the shipowner's claim has been fully satisfied.

For these reasons I think the contention that the non-assenting underwriters should not be allowed to share in the 100,000*l.* recovered from the bail is erroneous, and that the appeal should be dismissed.

ATKIN L.J. I agree, but I think it advisable to add my reasons because of the arguments addressed to us, and

(1) 13 App. Cas. 454.

C. A. 1921

THE JOANNIS VATIS.

Atkin L.J.

because of the somewhat unusual complications that are to be found in this case.

This action was commenced in what is quite common form in the Admiralty Division by a writ which does not specify the names of any of the parties. It is between "the owners of the steamship *Worsley Hall* and cargo" and "the owners of the steamship *Joannis Vatis*." That is a proper mode of issuing a writ, as was held in *The Assunta* (1), which decided that the old practice of the Admiralty prevailed notwithstanding the provisions of the rules in the Judicature Act. The difference in the practice has led to confusion in this case, because it has been the contention on the one hand that "the owners of the ship and cargo," if written out at large, would include, first, the names of the shipowners, and secondly, the names of all the owners of the cargo and the different items of cargo that were damaged. The other view is, that in using the words "The owners of the ship and cargo" only one set of persons were meant to be described, and those were the owners of the ship suing also as owners of the cargo. It has been held by the learned judge, as he says by the common assent of the parties who argued it before him, that it was the latter view only that was intended, and that the owners of the ship intended to sue also as owners of the cargo. I think that is probably right, because the solicitors appeared to have had no authority to act for anybody at the date of issuing the writ except the owners of the ship, and they had a right to sue as owners of the cargo by reason of their being bailees of the cargo. Therefore the right view is that the writ was issued by the shipowners claiming in respect of their own ship, and claiming also by reason of their special property as the bailees of the cargo, and they eventually by negotiation procured the owners of the Greek ship to put in bail to the extent of 100,000*l*. Now when a bailee sues he is entitled to recover the full value of the article converted or the full amount of the deterioration of the value of the chattel wrongfully injured. It is not necessary to decide in this case whether he can confine himself,

(1) [1902] P. 150.

if he sues, to the value of his own particular interest or the deterioration in the goods to the extent to which he himself has suffered. It is plain, at any rate, that he is entitled to claim, and he clearly could recover in the action, the full value of the damage; and it is plain in this case that it is upon that footing that the shipowners sued. At one time they suggested the damages would be 150,000*l.*, and it is sufficient to say that early in the action they sought to induce the other cargo owners, as they described them, to join in the action; and it is plain that they did so upon the footing that these cargo owners were entitled to share the expenses of the action, whether they won it or failed, and that could only have been on the footing that the action was brought to recover the values in which they would be interested. In other words, the claim went beyond the shipowners' own special interest, if they had any, in the fund. Under those circumstances the action was fought, some cargo owners accepting the invitation and some refusing, and the decree was made eventually by this Court pronouncing for the claim of the plaintiffs. That claim was that the damages to ship and cargo should be assessed, and the decree went on to provide that the defendants should be condemned "in the said damage" and that "the said damage" should be assessed by the registrar and merchants.

It appears to me, therefore, that it clearly was the duty of the registrar to assess the whole of the damage to the cargo in respect of which the plaintiffs as bailees were suing. So far no question would arise, but when that order was made the cargo owners, who had not responded to the invitation to share in the expenses, put forward a claim, first to be represented at the assessment, and secondly to share in the proceeds of the judgment, and that claim was, it appears to me, repudiated by the plaintiffs. The rights of the bailee have been plainly determined, so far as this Court is concerned, by the memorable judgment of the late Lord Collins in *The Winkfield* (1), and I need only read this passage, which I think sums up the whole of the law, so far as it is

(1) [1902] P. 42, 60.

C. A. 1921

THE JOANNIS VATIS.

Atkin L.J.

necessary to this decision: "As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor."

It appears to me to be plain that bailees, having recovered on the footing of the full amount of the damage done to the cargo, would have to account to the bailors for what they had received over and above their own interest as bailees. But the contentions that have been put forward by the bailees in this case were, first, that the registrar was not to consider in the assessing of the damages the claims that were made by the cargo owners who had in the course of the trial refused to make themselves at that stage responsible for the costs; secondly, that even if the whole of the damages were to be taken into account by the registrar, the non-assenting cargo owners were not to have any interest in the amounts that were so recovered; and thirdly they contended—at any rate, they contended it before us—that in any case, even if the non-assenting cargo owners had any rights, the proper procedure was to hand over the whole of the money to the bailees, who were repudiating the right of the non-assenting cargo owners to receive anything, and then leave them to formulate their rights against the bailees to account to them. I think the plaintiffs, the bailees, were wrong in every one of those contentions. It appears to me plain that it was the duty of the registrar to assess the whole of the damage as he had been ordered to do, and it appears to me also plain that the non-assenting cargo owners, being bailors, had a right to have the bailee account to them for so much as he would receive in respect of claims made in

respect of their cargo. Those matters seem to me to be beyond dispute. One could well understand a man saying, this was an action that involved some risk, and by your standing aside you have shown that you were prepared to take the benefits and have not been prepared to shoulder the burdens, and to some extent that is true. But, on the other hand, the bailor may say, you chose to sue as bailee for the whole of the damage, you recovered a sum of money, and if you did recover anything for me, then I have got my rights at law against you. I think that is the true view, and that the bailors cannot be shut out because they refused to bear part of the costs.

The question as to whether the proper procedure has been adopted is to my mind the only substantial question in this case—it is the only question on which there was any doubt—but on considering it I think we ought to have no hesitation in deciding that the proper procedure has been adopted. A sum of money is available to the bailee; it is not yet in Court, but it undoubtedly represents the whole of the sum of money which can be enforced against the defendants in respect of the whole damage to the cargo, and when the bailee receives it he will be under an obligation to account to all the cargo owners.

Before he has received it, and before the Court even has taken the necessary steps to enable the money to be paid, or given authority to him to collect it, he repudiates before the Court the obligation to recognize the rights of his bailors. Under those circumstances it seems to me impossible that any self-respecting Court could act in such a way as to enable that bailee to receive the whole of the money as long as the Court had any control over it at all, and it appears to me perfectly proper that the Court should allow the claimants against the bailee to come to the Court to say that they seek in that action to establish their claim. That is what has been permitted in this case. If the sum of money were in Court, such claim would be made under ordinary circumstances in the common law Courts, and possibly an issue might be directed in respect of each claimant, or a general inquiry

C. A. 1921

THE JOANNIS VATIS.

Atkin L.J.

might be directed, and I think it is perfectly right that the registrar under the direction of the judge, or with the assent of the judge, should have undertaken such inquiry in the present circumstances. I am not quite satisfied that the learned judge's decision under Order XII., r. 24, was necessary or even well-founded. That rule provides that: "In an Admiralty action in rem any person not named in the writ may intervene and appear as heretofore, on filing an affidavit showing that he is interested in the res under arrest, or in the fund in the Registry." I can understand that may apply where the claimant would come in the nature of a defendant, who would, therefore, ordinarily enter an appearance; and that would, no doubt, apply in the ordinary limitation suit, where the plaintiff is the person who provides the money, and where the writ is directed to all persons who have claims in respect of the damage in respect of which liability is sought to be limited. In that case the claimants are strictly and in form in the nature of defendants. I am not at all sure that that rule applies where claimants come in who really are claiming as being interested in what has been recovered by the plaintiffs. But that is merely form, and I am quite satisfied that there is ample jurisdiction in the Court to give effect to claims which are made to the Court to share in the fund, or the equivalent of the fund, before the money is released to persons who the Court may consider have no right to it at all. Here it is quite plain that the amount for which bail has been found cannot be made available at all except by permission of the Court, and I think the Court has ample jurisdiction to say that it will have an inquiry as to who are the persons beneficially, and therefore truly, entitled to this money, and will only give permission to enforce the bail bond to the persons who are beneficially entitled to receive their money.

The only other point is, upon what terms are they entitled to receive it? It appears to me that the learned registrar meant to decide, and I think he did decide, that all the cargo claimants were entitled to share pari passu. In one event he says the claimants' solicitors are "estopped from refusing,

at the eleventh hour, to allow the non-assenting underwriters to share pari passu in the fund available for all claimants." That means that the shipowners, in respect of the damage to the ship, and the cargo owners, in respect of the damage to the cargo, share in the fund available for all claimants. I think that the learned judge clearly was of the same opinion. He says: "The first charge will be the shipowners' costs of recovery, and in the balance the non-assenting underwriters are entitled to participate." That must mean, I think, pari passu, especially as he then makes a reference in principle to the proceedings by analogy for limitation of liability where, as we all know, the fund is under the statute distributed rateably to the claimants.

It appears to me, therefore, that the judgment of the learned judge below was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the respondents: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool; Thomas Cooper & Co.*

E. C. M. T.

1921
Dec. 16.

PROBATE. Followed. *In re* R., DECD. [1951] P. 10

In the Estate of THE EARL OF SHREWSBURY (DECEASED).

McLEOD *v.* THE EARL OF SHREWSBURY (INFANT BY HIS GUARDIAN).

ELEANOR WHYTE HUGHES BROWNLEE, INTERVENER.

Probate—Practice—Substance of the Case—Rules of the Supreme Court, Order XIX., rr. 6, 25A—*Unsound Mind—Undue Influence.*

Where in an action to establish a will the defendant pleads that the testator is of unsound mind, or that the will was obtained by undue influence, the plaintiff is entitled to have stated in the substance of the case particulars of the nature of the unsoundness, and of the character of the undue influence and the acts alleged in the exercise of it, with necessary dates, but not of the names of the persons present.

The decisions in *Lord Salisbury* v. *Nugent* (1883) 9 P. D. 23 and *Hankinson* v. *Barningham* (1883) 9 P. D. 62 must be considered to be overruled by Rules of the Supreme Court, Order XIX., r. 25A, which was added in 1901.

Wallace v. *M'Dowell* [1920] 2 I. R. 194 not followed.

IN this case the plaintiff, one of the executors of the late Earl of Shrewsbury, who died on May 17, 1921, propounded the will of the deceased dated September 24, 1920, under which Eleanor Brownlee took considerable benefits. The defendant, the infant son and heir of the late Earl, by his guardian the Marquis of Anglesea, disputed the will on the grounds of want of due execution, want of knowledge and approval, and alleging (3.) that the deceased Earl was not of sound mind, memory and understanding, and (4.) that the alleged will was obtained by undue influence by Eleanor Brownlee, who intervened.

The substance of the case as to (3.) and (4.) was set out as follows in paras. 3 and 4 of the defence :—

Para. 3 : "From 1914 until his death the deceased suffered from continuous serious heart, liver and kidney troubles. His physical and mental state gradually deteriorated until his death. Owing to the serious state of his health, which

1921

SHREWSBURY (EARL), *In the Estate of.*

was brought about in a great measure by chronic alcoholism, he suffered from anæmia of the brain. During the last 18 months of his life the deceased was quite incapable of managing his affairs, became changed in manner, was unable to recognise his relations and servants, wandered in his conversation, had difficulty in collecting his thoughts and carrying on a continuous and sustained conversation; thought animals were being killed in his bedroom, was unable to dictate and incoherent in his speech. He did not know where he was. At the time of the execution of the said alleged will the deceased was in such a condition of mind and memory as to be unable to understand the nature of the act and its effects, the extent of the property of which he was disposing, or to comprehend and appreciate the claims to which he ought to give effect."

Para. 4: "The said Nellie Brownlee took advantage of the indifferent mental state of the deceased and knowing that his memory was greatly impaired coerced him into making the said alleged will. Her influence over the deceased became so complete that he was not a free agent and the said alleged will was not the offspring of his own volition but was obtained by the importuning of the said Nellie Brownlee. She assumed the control and management of the deceased's house and home, compelled the servants to obey her orders, discharged nurses who were attending the deceased, entertained certain guests of whom the deceased disapproved, tampered with the private letters and papers of the deceased, prevented the near relatives of the deceased seeing him save in her presence, and made false statements to them concerning the state of the deceased's health. The said Nellie Brownlee procured the conveyance to herself of the deceased's house 'Cariad' at Goring-on-Thames and obtained valuable jewellery from him. During his illnesses she treated the deceased with roughness. The deceased became completely cowed in her presence. She frequently terrified and upset the deceased with outbursts of temper and on one occasion assaulted him with a large paper knife injuring his arm and blackening his eye."

1921

SHREWSBURY (EARL), *In the Estate of.*

On November 15, 1921, the intervener issued a summons for a further and better substance of the case under para. 4 of the defence with dates as follows :—

"*a.* Nature of advantage taken.
"*b.* Nature of coercion.
"*c.* Nature of importunity.
"*d.* Names of servants and situation and name of house.
"*e.* Names of nurses.
"*f.* Names of guests (dates and places of entertainment).
"*g.* Identify letters and papers tampered with.
"*h.* Names of relatives.
"*i.* Nature of false statements.
"*j.* Description of jewellery.
"*k.* Nature of roughness.
"*l.* Dates and places of outburst of temper.
"*m.* Date and place of assault."

The Registrar ordered further and better substance of the case as to *a*, *b*, *c*, *d*, *e*, *f* (omitting words in bracket), *g*, *h*, *i*, *j*, but refused the rest.

On November 25, 1921, the plaintiff took out a summons for further and better substance of the case under para. 3 as follows :—

"*a.* Of the deceased's incapacity to manage his affairs.
"*b.* Of the nature of the deceased's change in manner with dates.
"*c.* Of the relatives and servants whom the deceased was unable to recognise with dates and places.
"*d.* Of the deceased's wandering in his conversation with dates, places and names of persons with whom he was conversing.
"*e.* Of the deceased's difficulty in collecting his thoughts and carrying on a continuous and sustained conversation with dates, place(s) and names of persons with whom he was conversing.
"*f.* Of the dates when and the places where and the person(s) in whose presence the deceased thought animals were being killed in his bedroom.
"*g.* Of the deceased's inability to dictate with dates and

place(s) and the subject matter of his attempted dictation and the person(s) to whom he was attempting to dictate.

"*h.* Of the dates when, the place(s) where and the person(s) in whose presence the deceased was incoherent in speech.

"*i.* Of the dates when, the place(s) where and the person(s) in whose presence the deceased did not know where he was."

The Registrar ordered the defendant to give further and better substance of the case under the heads *b*, *c*, *h*, and to identify occasions when the deceased did not know where he was, and to give particulars of delusions with regard to animals with dates and places, but refused as to the other heads and also refused in any case to require the defendant to give the names of persons in whose presence the various occurrences took place.

All the parties appealed from the different parts of these decisions.

J. G. Joseph for the plaintiff.

D. Cotes-Preedy for the defendant.

W. O. Willis for the intervener.

The appeals were argued in chambers, but the President adjourned them into Court for judgment only.

Dec. 16. SIR HENRY DUKE P. [after stating the facts and proceedings as above and reading paras. 3 and 4 of the defence continued :] Plaintiffs applied for a further statement of the substance of the case under para. 3 in a summons of an extremely searching character, requiring the statement, with times and places, not only of facts intended to be relied upon by the defendant, but of the persons present at the various occurrences alleged. To comply with an order in the terms of the summons would require the defendant to furnish names of probable witnesses, if not the tenor of their expected evidence.

The order made upon this summons disallowed to a

1921

SHREWSBURY (EARL), *In the Estate of.*

The President.

considerable extent the application for names of persons present at alleged occurrences. It directed the defendant to furnish some further information as to the substance of his case.

The defendant appeals against the making of any order on plaintiff's summons, contending that if the statement of substance of the case was obligatory (which is not admitted) the obligation would be fulfilled in the pleading. Plaintiff appeals to obtain the full particulars sought by his summons.

The intervener's summons under para. 4 of the defence demanded further general information as to several allegations made in the substance of the case delivered thereunder. It also sought some particulars of dates, names and places. An order was made directing the defendant to furnish most of the general information so claimed, and some particular information, but refusing in most cases to require statement of dates and places. The defendant appeals on the ground that under the practice of the Court no order ought to have been made. The intervener's appeal insists upon the demand in her summons.

On both sides the appeals raise questions which cannot be properly answered without a distinct understanding of the existing practice of the Court with regard to the statement of the substance of the case alleged under defensive pleas in actions for probate. On the plaintiff's behalf counsel sought to apply Order XIX., r. 6, of the Rules of the Supreme Court. On the defendant's behalf counsel denied the claims of the plaintiff and of the intervener on the ground that Order XIX., r. 6, does not apply, and that with regard, certainly to undue influence and probably to insanity, a defendant alleging the same is free from any obligation to state the substance of his case. Reliance was placed for the defendant upon the judgment of the Court of Appeal in *Lord Salisbury* v. *Nugent* (1), as to the plea of undue influence, and upon the judgment of Sir James Hannen P. in *Hankinson* v. *Barningham* (2), as to insanity. Mr. Cotes-Preedy supported his argument by reference to a recent decision in the Court

(1) 9 P. D. 23. (2) 9 P. D. 62.

1921

SHREWSBURY (EARL), *In the Estate of.*

The President.

of Appeal in Ireland in a case of *Wallace* v. *M'Dowell.* (1) The last-mentioned decision deals directly with the case of alleged undue influence, but involves also in its conclusions the case of alleged insanity, and supports in both respects the argument advanced on behalf of the defendant.

The two cases of *Lord Salisbury* v. *Nugent* (2) and *Hankinson* v. *Barningham* (3) have the clear effect of deciding that with regard to pleas of undue influence and of insanity, the practice of the Probate Division was not in 1883 governed by the provisions of Order XIX., r. 6, with respect to the obligation of parties to furnish particulars of matters pleaded.

What appears from the respective judgments in *Lord Salisbury* v. *Nugent* (2) and *Hankinson* v. *Barningham* (3) is that there was in 1883 an existing and established practice in probate which had not been overruled by Order XIX., r. 6. In fact that practice is found embodied in r. 40 of the Rules of Contentious Practice in Probate, a rule made in 1865 under statutory powers (20 & 21 Vict. c. 77; 21 & 22 Vict. c. 95), and not revoked expressly before 1883—or indeed since—by any rule under the Judicature Acts.

Rule 40 authorized the pleading of several defences by defendants in probate actions, and as to one of such defences only, that of want of knowledge and approval of the contents of a will, directed that the party pleading the same should deliver with such a plea "particulars stating shortly the substance of the case he intends to set up thereunder," and the rule allowed pleas of insanity and of undue influence to be pleaded without any such statement, and the decisions in *Lord Salisbury* v. *Nugent* (2) and *Hankinson* v. *Barningham* (3) sanctioned the practice of refusal to require the same. I may add, as matter of interest, that Lord Esher M.R., in the Court of Appeal in *Cave* v. *Torre* (4), expressed his entire concurrence in the judgment in *Hankinson* v. *Barningham* (3), and that in *In re Hailstone* (5), Cozens-Hardy M.R. stated with regard to the practice in this Court: "But when we

(1) [1920] 2 I. R. 194.
(2) 9 P. D. 23.
(3) 9 P. D. 62.
(4) (1886) 54 L. T. 515.
(5) [1909] P. 118, 120.

1921

SHREWSBURY (EARL), *In the Estate of.*

The President.

find distinct rules in the Probate Court dealing with a particular subject-matter, they, in my opinion, remain in force notwithstanding that there may be a different rule dealing with that subject-matter in the Rules of the Supreme Court."

The decisions of 1883, to which I have referred, were acted upon continuously until 1901. In that year, however, by a rule made under the Judicature Act by a rule committee, of which Sir Frances Jeune P. was a member, a specific amendment was made in the practice with regard to the matters now in question. The rule so made relates explicitly and exclusively to the practice in probate.

Order XIX., r. 25A, is in these terms: "In Probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely; and further where it is pleaded that the testator was not of sound mind, memory, and understanding, particulars of any specific instances of delusion shall be delivered before the case is set down for trial, and, except by leave of the Court or a Judge, no evidence shall be given of any other instances at the trial."

The contention was made before me that upon the true construction of the rule and for the reasons stated in *Wallace* v. *M'Dowell* (1), r. 25A does no more than require defendants, who allege insanity with specific delusions, to state the nature of the delusions so alleged, and in all other respects leave the old practice in probate unaffected. The judgments in *Wallace* v. *M'Dowell* (1) appear on the face of them to support this view.

Sir James Campbell C. referred to rules framed under the Judicature Act after the decision of *Lord Salisbury* v. *Nugent* (2) in these terms (3): "That case was decided in December, 1883, and subsequent rules were framed in England under the Judicature Act, extending the previous rules in many respects, but from the date of that decision no attempt was made by any subsequent rule to alter the practice as then laid down, or to compel a party in a probate action to

(1) [1920] 2 I. R. 194. (2) 9 P. D. 23.
(3) [1920] 2 I. R. 197, 198.

give particulars of a plea of undue influence. We are bound to have respect to decisions of the eminent Judges who decided that case, especially as the settled practice in Ireland appears to be the same as that in England."

Ronan L.J. made express reference to Order XIX., r. 25A, and observed upon it that (1): "the Legislature"—meaning the rule committee—"with knowledge of the two decisions"—namely, *Hankinson* v. *Barningham* (2) and *Lord Salisbury* v. *Nugent* (3)—"deliberately altered the Rules to meet the effect of one of these decisions, but left the decision in *Lord Salisbury* v. *Nugent* (3) unaffected." These passages seem to treat r. 25A as having had no other effect than to require the giving of particulars of specific delusions—a construction which gives no effect to the general direction with which the rule begins.

In the natural sense of the language employed the direction contained in the opening clause of r. 25A extends to all defences, including those of insanity and undue influence, as well as the other three defences mentioned in r. 40 of the Rules of Contentious Practice. The direction in the concluding words of r. 25A purports on the face of it to add to the general direction a particular requirement with regard to any plea of insanity which alleges specific delusions.

After careful consideration of the reasoning contained in the judgments in *Wallace* v. *M'Dowell* (4) I am unable in the particulars I have indicated to adopt the conclusions there expressed.

That r. 25A was intended to change the practice in this division with regard to statement of the substance of the cases pleaded, must I think be clear to every one who is acquainted with the practice as it has existed since the rule was made. Under the guidance successively of Lord St. Helier and Lord Gorell, the then judges of the Court, statement of substance of the case alleged under every defence became, and it now is, matter of every-day observance. In 1904 an amendment of

(1) [1920] 2 I. R. 198.
(2) 9 P. D. 62.
(3) 9 P. D. 23.
(4) [1920] 2 I. R. 194.

1921

SHREWSBURY (EARL), *In the Estate of.*

The President.

r. 25A was made, slightly extending its operation, and this amendment was made by a rule committee of which Sir Francis Jeune P. was a member. Reference to the current edition of Tristram and Coote's Probate Practice will show more than a dozen precedents for such necessary statement in typical cases of all kinds. The defence delivered in the present case, and now in question, illustrates the common understanding of the rule. It is further illustrated by the practical application of it made by the very experienced Senior Registrar of the Court in the orders which are now under appeal. In so far as a contrary view of this practice in this Court is expressed in *Wallace* v. *M'Dowell* (1) I am bound to say that the contrary view is erroneous. I inquired of the Registrars with regard to the plea of undue influence, and they state that their practice is to apply the decision in *Lord Salisbury* v. *Nugent* (2) as modified by r. 25A. The practice is they say: "To make orders for further and better substance of the case of undue influence, but not for particulars of undue influence except as to names of persons charged."

The practice in Ireland is of course governed by the decision in *Wallace* v. *M'Dowell* (1), and I assume it to be founded in fact upon rules which did not include an equivalent of Order XIX., r. 25A, of the Rules of the Supreme Court. The practice of this Court must be determined in obedience to that Rule. The objection in principle made by the defendant to this order of the Senior Registrar must therefore be disallowed.

It is satisfactory to reflect that the practice actually in use here as I have detailed it is that which Cotton L.J. in the Court of Appeal in *Lord Salisbury* v. *Nugent* (2) and the judges of the Court of Appeal in Ireland in *Wallace* v. *M'Dowell* (1), alike thought to be most conducive to just administration of the law.

Except for the discussion caused by *Wallace* v. *M'Dowell* (1), the practical questions in these appeals are not important, or novel or difficult. The defendant's two appeals fail in

(1) [1920] 2 I. R. 194. (2) 9 P. D. 23.

principle and I am not ready upon either of them to make any alteration in detail.

As to the plaintiff's appeal, it for the most part insists on demands which I should think excessive if the practice in probate were the same as in the King's Bench Division, instead of being founded on specific rules. I am not sure, however, whether the allegation in the substance of the case that the deceased Earl was incapable of managing his own affairs may not require some explanation. I therefore amend the order in this respect and direct the defendant to state the nature and time or times and duration of the incapacity so alleged.

The appeal of the intervener against the Registrar's order, with regard to the defendant's plea and substance of the case of undue influence, asks for some few additional particulars. I have doubted whether all these requirements do not go beyond what the rules and practice require. The defendant however alleges a specific assault upon the deceased by the intervener, and there can be no hardship on the defendant in ordering him to state when and where that assault occurred. That he must do; and with this slight modification, I confirm the order.

Solicitors for plaintiff: *McLeod, Eyre, Dowling & Co.*

Solicitors for defendant: *Withers, Bensons, Currie, Williams & Co.*

Solicitors for intervener: *Capron & Co.*

J. R. B.

1921
Oct. 17;
Nov. 8;
Dec. 15, 16

[IN THE ADMIRALTY COURT AND IN THE COURT OF APPEAL.]

THE MOGILEFF (No. 2).

C. A.
1922
Jan. 17.

Shipping—Practice—Interpleader—Summons directed to the Crown—Ships registered in the Name of His Majesty represented by the Shipping Controller—Issue as to Ownership—R. S. C., Order LVII.

The Crown cannot be made a party to an interpleader issue.

Under a writ of fi. fa. taken out by the plaintiffs, the Sheriff of Lincoln seized two ships which the plaintiffs alleged were the property of their judgment debtors, a corporation styled the Russian Volunteer Fleet. The solicitor for the Board of Trade gave notice to the sheriff that the ships were the property of His Majesty and requested the sheriff to withdraw. The sheriff thereupon took out an interpleader summons directed to the plaintiffs and to His Majesty represented by the Shipping Controller:—

Held (Per Hill J. and the Court of Appeal), that on the broad principle that the King could not be made to submit to the jurisdiction of the King's Courts against his will, the Court could not order an interpleader issue.

Per Hill J. While the question whether the ships were the property of the Crown or of the judgment debtors remained undetermined the sheriff would not be ordered to withdraw.

Candy v. *Maugham* (1843) 6 Man. & G. 710 followed.

APPEAL from an order of the assistant-registrar dismissing an interpleader summons.

The following statement of the facts is taken from the judgment of Hill J.:—

"The plaintiffs, the Borneo Company Limited, a British corporation carrying on business as steamship agents, in a necessaries action in rem, recovered a judgment against the owners of the *Mogileff*. (1) The owners appeared and judgment went against them as well as against the *Mogileff*. The owners were a Russian corporation styled the Russian Volunteer Fleet, which at the date of the trial had its principal place of business at Constantinople. Under an order for sale the marshal sold the *Mogileff*, but the proceeds satisfied only a part of the judgment. The plaintiffs are still judgment creditors of the Russian Volunteer Fleet in a large sum, stated to be about 46,000*l*.

(1) [1921] P. 236.

1921

THE MOGILEFF (No. 2).

"Under a writ of fi. fa. directed to the sheriff of Lincolnshire and taken out by the plaintiffs, the sheriff seized two ships, the *Krasnoiarsk* and the *Vologda*, which the plaintiffs allege to be the property of the Russian Volunteer Fleet. The ships were lying at Immingham. They were there laid up. There is no suggestion that they were being presently employed in the active service of the Crown. The Solicitor for the Board of Trade gave notice to the sheriff that the ships were the property of His Majesty and requested him to withdraw. This was followed by a letter from the Solicitor to the Board of Trade dated August 9, 1921, and a certificate of the same date by Mr. Hipwood, assistant-secretary of the Mercantile Marine Department of the Board of Trade, to which were attached what purported to be certified copies of the transcripts of registers of the ships. In those transcripts the Shipping Controller was named as the representative of His Majesty.

"The plaintiffs disputed the claim put forward by the Board of Trade. The sheriff on August 16, 1921, took out an interpleader summons directed to the plaintiffs and to His Majesty represented by the Shipping Controller as claimant, calling upon the plaintiffs and the claimant to appear and state the nature and particulars of their respective claims to the ships and maintain or relinquish the same and abide by such order as might be made therein. The assistant-registrar dismissed the application and ordered the plaintiffs to pay the costs of it. He ordered the sheriff to remain in possession for five days or, if notice of appeal were given, then, pending appeal, or until further order; otherwise he ordered the sheriff to withdraw. From that order the plaintiffs appeal and ask that an issue be directed."

MacKinnon K.C. and *Langton* for the plaintiffs. The Crown can be made a party to an interpleader issue: *Errington* v. *Attorney-General* (1); *Reid* v. *Stearn*. (2) The statement in Robertson's Civil Proceedings by and against the Crown, p. 610, that the Interpleader Act, 1831 (1 & 2 Will. 4,

(1) (1731) Bunb. 303. (2) (1860) 6 Jur. (N. S.) 267.

1921

THE MOGILEFF (No. 2).

c. 58), which regulated interpleader proceedings prior to the Judicature Act, did not bind the Crown is unwarranted. The only case which supports the contention that the Crown cannot be made a party to interpleader proceedings is *Candy* v. *Maugham* (1), but the statements to that effect are obiter, as the case was decided on other grounds. The contention raised before the assistant-registrar that the old Interpleader Act of 1831 did not apply to the Crown because it made provision for the unsuccessful party paying costs is unsound: cf. *Anglo-Newfoundland Development Co.* v. *The King* (2), where it was held that the Arbitration Act, which also has provision as to costs, applied to the Crown. There is no other satisfactory way of trying the issue between the Crown and the plaintiffs and the interpleader issue should be directed.

Darby and *Alfred Bucknill* for the Crown. The statement of Tindal C.J. in *Candy* v. *Maugham* (1) is authoritative and Mr. Robertson at p. 611 of his work on Civil Proceedings by and against the Crown states that to his own knowledge that case has been followed in chambers on several occasions. On the well-established principle that, unless it has consented by statute, the Crown cannot be made a party to proceedings in its own Courts except by petition of right, the Court cannot allow an interpleader issue to be directed against the Shipping Controller representing His Majesty. The decision in *Candy* v. *Maugham* (1) does not appear to have been cited to the Court in *Reid* v. *Stearn* (3), which was wrongly decided and should not be followed. The interpleader issue in *Errington* v. *Attorney-General* (4) was directed against the Attorney-General, who may have been made a party owing to his peculiar jurisdiction in the matter of infants, and in any event the Attorney-General is in a different position from the Crown. The plaintiffs' only remedy is by petition of right.

J. Ellis Cunliffe for the sheriff adopted the arguments put forward on behalf of the plaintiffs.

(1) 6 Man. & G. 710.
(2) [1920] 2 K. B. 214.
(3) (1860) 6 Jur. (N. S.) 267.
(4) (1731) Bunb. 303.

Langton in reply. The plaintiffs are not attempting to compel the Crown to plead; the Shipping Controller has stepped in and said that the ships are the property of the Crown. The Crown therefore has in effect initiated proceedings and must be taken to have waived the question of jurisdiction.

Cur. adv. vult.

Nov. 8. HILL J. read the following judgment. [His Lordship stated the facts set out above and continued:] Two questions arise: (1.) whether the Crown can be summoned to appear upon an interpleader summons and made a party to an interpleader issue; (2.) whether the Court ought to order the sheriff to withdraw.

I have come to the conclusion on the first question in favour of the Crown, and on the second question in favour of the plaintiffs. I decide the first question in the Crown's favour, not because there is not an issue to be tried—I think there is—but because the Court has no power to compel the Crown to answer the sheriff's summons or to submit that issue to the Court. I decide the second issue in the plaintiffs' favour, because I think there is a serious issue to be determined before it can be held that the ships belong to the Crown and not to the Russian Volunteer Fleet; and until that issue has in some way been determined against the plaintiffs, I am not prepared, and have no right, to deprive the plaintiffs of the benefit of the execution.

I think there is a serious issue to be determined, because I have not before me any sufficient evidence putting it beyond doubt that the ships belong to the Crown and not to the Russian Volunteer Fleet. No one appeared for the Russian Volunteer Fleet to say that the ships do not belong to that corporation; and for the Crown, counsel was not able to say more than appears in the documents, and the documents, in my judgment, do not show that the ships are the property of the Crown. The Solicitor for the Board of Trade says in the letter of August 9, 1921: "I am forwarding herewith a certificate signed by the assistant-secretary of the Mercantile Marine Department of the Board of Trade certifying that the

1921

THE MOGILEFF (No. 2).

HILL J.

vessels above named have been the property of the Crown since 1918, and annexing to such certificate transcript of the registers of the vessels in question." But the certificate of the assistant-secretary does not certify that the vessels are or ever were the property of the Crown. It certifies "That the *Krasnoiarsk* was registered in London in the name of His Majesty represented by the Shipping Controller on the 21st June, 1918, and the *Vologda* was registered in London in the name of His Majesty represented by the Shipping Controller on the 26th June, 1918," and adds "appended to this certificate are certified copies of the transcript of register for the vessels in question." In this certificate Mr. Hipwood, than whom no one knows better what he is saying in matters of merchant shipping, does not say that His Majesty is the owner of the ships, or that the ships are the property of the Crown. He only says that they were on the dates named registered in the name of His Majesty. Do the registers show anything more? The certified copies appended to Mr. Hipwood's certificate, if correct transcripts, would show that His Majesty was registered not as owner, but as "registered owner." The transcripts were, however, incorrect. The registers have been produced before me. They agree with the blue transcripts certified by the Registrar-General, which were also produced before me. In each register the ship is described as "formerly under the Russian flag," and in the space headed in print "Names, Residences and Description of the Owners and the number of 64th shares held by each" are the words "His Majesty represented by the Shipping Controller, London, 64 shares." The registers also show that the *Krasnoiarsk* was, on April 22, 1918, registered at Halifax, Nova Scotia, in the name of "His Excellency the Governor General of Canada," and that this register was closed on July 24, 1918, and that the *Vologda* was, on April 29, 1918, registered at St. John's, New Brunswick, in the name of the "Governor General of the Dominion of Canada for the time being, Ottawa" and that this register was closed on January 23, 1919. The *Vologda* register states that this Canadian registration was by order of the

Marine and Fisheries Department Order in Council, dated April 17, 1918.

Do the registers give any evidence of ownership in the Crown? For the purpose of the present case, it is enough if they are sufficient evidence of legal ownership. If they are, and the legal estate is in the Crown, even though the beneficial interest is not, the plaintiffs' remedy cannot be by execution under a fi. fa., but must be by some form of equitable execution. But are the registers evidence that the Crown is the legal owner of the ships? By s. 64 of the Merchant Shipping Act, 1894, the register and a certified transcript of the register are made admissible in evidence, and by s. 695 are made evidence of the matters stated therein in pursuance of this Act. In the case of a British ship privately owned, one of the matters stated in pursuance of the Act is by s. 11—"the name and description of the registered owner or owners." In the case of such a ship the register is therefore prima facie evidence of ownership. But by s. 741, the Act does not, except where specially provided, apply to ships belonging to His Majesty. Such ships cannot be registered under the Act of 1894. By s. 80 of the Merchant Shipping Act, 1906, provision is made for the registration of Government ships which are defined as "ships not forming part of His Majesty's Navy which *belong* to His Majesty, *or* are *held* by any person *on behalf of or for the benefit* of the Crown, and for that reason cannot be registered under the principal Act." Sect. 80, sub-s. 1, provides as follows: "His Majesty may by Order in Council make regulations with respect to the manner in which Government ships may be registered as British ships for the purpose of the Merchant Shipping Acts, and those Acts, subject to any exceptions and modifications which may be made by Order in Council, either generally or as respects any special class of Government ships, shall apply to Government ships registered in accordance with those regulations as if they were registered in manner provided by those Acts." By Order in Council of September 29, 1917 (No. 1074), regulations were made as regards any Government ships in

1921

THE MOGILEFF (No. 2).

Hill J.

the service of the Shipping Controller. By these regulations s. 1 and ss. 8 to 12 of the Merchant Shipping Act, 1894, are not to apply to Government ships in the service of the Shipping Controller registered in pursuance of the provisions of the Order in Council. Sect. 1 of the Act of 1894 is the section which prescribes the qualifications for owning a British ship. Sects. 8 to 12 prescribe the method and conditions of registration and include s. 11 quoted above. Under the Order in Council application for registration is to be made by the Secretary to the Ministry of Shipping, and such application is to contain a statement of the nature of the title to the said ship, whether by original construction by or for the Shipping Controller or by purchase, capture, condemnation or otherwise. Upon receipt of the application the registrar shall enter the ship in the Register Book as belonging to His Majesty represented by the Shipping Controller. It must have been under s. 80 of the Act of 1906 and this Order in Council that the *Krasnoiarsk* and the *Vologda* were registered. The assistant-registrar who produced the register said they were so registered. It will be observed that the registrar has no discretion in the matter. It will also be observed that " title " is used in a wide sense, for it includes title by capture, but capture does not vest the ownership in the captor. We are quite familiar with at least one class of ships which during the war were registered in the name of His Majesty as represented by a Department of State and which unquestionably were not the property of His Majesty. Enemy ships seized in port at the outbreak of war and ordered by the Prize Court to be detained under the *Chile* form of Order (1), were so registered for the purpose of being employed by the Government under the British flag. But the effect of the *Chile* Order was to reserve all rights intact for decision when the war was over (per Privy Council in *The Prinz Adalbert* (2)), and until those ships were condemned as prize, which was not done till after the armistice, they remained the property of their original enemy owners pending a final decision of the Prize Court.

(1) [1914] P. 212, 217. (2) [1918] A. C. 500.

1921

THE MOGILEFF (No. 2).

Hill J.

Now I apply s. 695 of the Act of 1894 to a ship registered under s. 80 of the Act of 1906 and the Order in Council. The register is evidence of the matters stated therein in pursuance of s. 80 and the Order in Council. What is stated in these registers is that a ship formerly under the Russian flag is owned by "His Majesty represented by the Shipping Controller," but, having regard to s. 80 and the Order in Council, that merely denotes that the ship is a Government ship in the service of the Shipping Controller, and the expression "Government ship" only denotes that the ship either belongs to His Majesty or is "*held*" by the Shipping Controller "*on behalf or for the benefit* of the Crown." "Held" is a word which may cover any sort of possession. If ships detained under a *Chile* form of Order could be registered under s. 80 and the Order in Council, I see no reason why ships which were not the property of the Crown but had come into the possession of the Crown otherwise than by the requisition of a captured but not condemned ship should not be so registered. For instance, if a Russian owner had lent the use of his ship to the Crown for the duration of the war, I see no reason why it should not be registered as detained ships were registered, if the *Chile* class of ships could be so registered. It is a possible view that neither class could properly be so registered, for it may be that the reason why they could not be registered under the principal Act was not because they were held on behalf of His Majesty, but because they had not ceased to be foreign owned; and, if so, s. 80, sub-s. 3, did not apply. But the fact that ships foreign owned were registered under s. 80 and the Order in Council shows that no sure reference as to ownership can be drawn from the statement in the register. I can draw no certain inference from the register as to the Crown's ownership, whether legal or otherwise.

Nothing outside the register makes me draw any such inference. On the contrary, if I consider anything outside, my doubts are only strengthened. At the trial of *The Mogileff* (1) it was proved that the ship was released from the service of the Crown to the Russian Volunteer Fleet on certain terms,

(1) [1921] P. 236.

1921

THE MOGILEFF (No. 2).

HILL J.

and for a specific voyage, but there was nothing whatever to suggest that the Crown claimed to be the owner of the ship. Reference was made to a petition of right by the Russian Volunteer Fleet and the Borneo Company, in which the suppliants allege that the *Krasnoiarsk* and the *Vologda* and other ships were by agreement taken over or requisitioned by His Majesty's Government on certain terms for the duration of the war, and claim that the Russian Volunteer Fleet as owners of the said ships are entitled to a return of the ships not already redelivered. To this petition the plaintiffs are a party, but the only allegation with regard to them is that five of the ships, including the *Mogileff*, had been redelivered to the plaintiffs as agents for the Russian Volunteer Fleet. In this petition of right the suppliants set out a letter from the Foreign Office which says that the vessels can only be returned to the parties who own or control the Russian Volunteer Fleet. The answer and plea denies that there was any agreement with the suppliants, refers to the documents for their contents, and does not admit the allegations in the petition. Of course I cannot accept the allegations of the petition as evidence, nor treat the letter from the Foreign Office as proved. But at least the petition and answer show that it cannot be treated as proved that the ships are the property of His Majesty. While the question whether the *Krasnoiarsk* and the *Vologda* are the property of His Majesty or of the Russian Volunteer Fleet is still undetermined, I cannot order the sheriff to withdraw.

But I have reluctantly come to the conclusion that I cannot compel the Crown to the determination of that question by the trial of an interpleader issue. The plaintiffs rely on *Errington* v. *Attorney-General* (1) and *Reid* v. *Stearn*. (2) The Crown relies on *Candy* v. *Maugham*. (3) In the cases relied on by the plaintiffs an interpleader issue between the Crown and the subject was ordered to be tried. In *Candy* v. *Maugham* (3) it was refused. The plaintiffs contend that

(1) Bunb. 303. (2) 6 Jur. (N. S.) 267.
(3) 6 Man. & G. 710.

what was said by Tindal C.J. and Maule J. in the course of the argument in *Candy* v. *Maugham* (1) were obiter dicta, and that the refusal of an issue was right upon the facts of the case. But the dicta, if obiter, are very strong, and are to the effect that the Crown cannot be compelled to appear before the Court or be made a party to an interpleader issue. Mr. Robertson in his work on Civil Proceedings by and against the Crown at p. 611 says that *Candy* v. *Maugham* (1) had, to his own knowledge, been followed several times in chambers. All these cases relate to stakeholders' interpleaders. I can see no distinction for the purpose in hand between such interpleaders and sheriffs' interpleaders. The plaintiffs suggested that, as in 1873, there was a conflict between the common law and the equity cases, sect. 25, sub-s. 11, of the Judicature Act, 1873, makes the equity cases the ruling authority. I do not think that section applies to alter the rights of the Crown. Let us go back to the underlying principle. The plaintiffs say the principle is that no action lies against the Crown at the suit of a subject, and they say that in asking for an interpleader issue no one is seeking to maintain an action against the Crown; the Crown has asserted a claim and is invited either to withdraw it or prove it, and, as it does not withdraw it, is directed to prove it. I however am of opinion that the rule that no action lies against the Crown at the suit of the subject is part only of the wider principle that the King cannot, against his will, be made to submit to the jurisdiction of the King's Courts. For this I cite the passage in Blackstone, i., 242, quoted by Brett L.J. in *The Parlement Belge* (2): "Our king . . owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King, even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress; and the sentence of a Court will be contemptible unless that Court had power to command the execution of it: but . . who shall

(1) 6 Man. & G. 710.
(2) (1880) 5 P. D. 197, 206.

[Some errors in the citation as there printed are corrected.]

1921

THE MOGILEFF (No. 2).

Hill J.

command the King?" In this case the Crown does not consent to submit to the jurisdiction of the Court, and the Court cannot command it to do so.

The result of my decision is to leave matters in a most unsatisfactory position. The difficulties of the sheriff are obvious. The plaintiffs are in hardly less difficulty. It was suggested that they can get the matter in issue determined by proceeding with the petition of right to which I have already referred. But of that petition they are not masters, and the evidence in support of it must mainly come from the Russian Volunteer Fleet, who in the *Mogileff* action are the plaintiffs' judgment debtors. It was also suggested that the plaintiffs could bring a petition of right claiming that the register be rectified. But it may well be that the ships are properly registered, and yet that they are the property of the Russian Volunteer Fleet. It may be questioned whether petition of right lies where the suppliant seeks to recover nothing from the Crown, neither land, nor goods, nor money, nor any incorporeal right (Robertson, p. 331); and even supposing that petition of right is an available remedy for the purpose of having it declared that the ships are not the property of the Crown, the plaintiffs on such a petition would have upon them the burden of proving a negative, whereas, if an interpleader issue could be tried, the Crown would naturally be made plaintiff, and have to establish its claim.

But while I feel all the difficulties and the risk of a denial of justice to the plaintiffs, I must administer the law as I find it, trusting that some method may be devised for the speedy determination of the matter in issue, and that the advisers of the Crown will assist to that end. They must bear in mind that at times when the Crown by its servants in the various departments of Government engages in commerce, as shipowner and charterer, as marine underwriter and wholesale dealer in commodities, great hardships may be occasioned to the subject by too strict an insistence upon the constitutional rights of the Crown.

I vary the order by dismissing the summons simply,

without costs either here or below, except that the sheriff may add his costs to his costs of the execution. Neither the plaintiffs nor the Crown have wholly succeeded.

The plaintiffs appealed. (1)

1922. Jan. 17. *MacKinnon K.C.* and *Langton* for the appellants.

Sir Gordon Hewart A.-G. and *Darby* for the Board of Trade.

Holman Gregory K.C. and *J. R. Ellis Cunliffe* for the Sheriff.

[The arguments for the appellants were the same as in the Court below. In addition the point was taken that the interpleader summons could be directed against the Attorney-General, claiming a declaration as to the rights of the execution creditors.

The respondents were not called on.]

BANKES L.J. I very much regret that it is not possible in my opinion to take any other view of the matter than the one taken by the learned judge. In my opinion the view he took was entirely right.

The matter arises in this way: [His Lordship stated the facts and continued:] Now, interpleader, as its name indicates, was a proceeding instituted for the purpose of relieving persons, sheriffs and others, who made no claim themselves to a subject matter which was claimed by two other parties, summoning them to appear before the Court and in a summary proceeding get a decision from the Court as to which of the two claimants was entitled to the subject matter of the claim. It is not necessary to refer to the history of the proceeding, because now the procedure is contained in

(1) On December 7 the under-sheriff moved the Court to set aside a writ of Venditioni Exponas, which had been served on him at the instance of the plaintiffs, calling on him to sell the ships. It was stated that the plaintiffs had not issued the writ in any hostile spirit, but merely in order to satisfy the Court on appeal that they had taken all possible steps to obtain the fruits of their judgment. Hill J. stayed all proceedings under the writ until after the pending appeal.

C. A. 1922

THE MOGILEFF (No. 2).

Bankes L.J.

the Rule of Court which deals with interpleader. The learned judge has held that Order LVII. does not apply to the Crown or bind the Crown and that it is not possible to compel the Crown to interplead. He sums up his view in the following way: "Let us go back to the underlying principle. The plaintiffs say the principle is that no action lies against the Crown at the suit of a subject, and they say that in asking for an interpleader no one is seeking to maintain an action against the Crown; the Crown has asserted a claim and is invited either to withdraw it or prove it, and as it does not withdraw it, is directed to prove it. I however am of opinion that the rule that no action lies against the Crown at the suit of the subject is part only of the wider principle that the King cannot, against his will, be made to submit to the jurisdiction of the King's Courts." For that he cites authority, and in my opinion the view there expressed by the learned judge is quite correct.

Mr. MacKinnon bases his argument, as I understand it, upon two grounds. His first point is that there is authority to the contrary of the view expressed by the learned judge and he relies upon *Reid* v. *Stearn*. (1) In my opinion that case is no authority for the proposition for which Mr. Mackinnon cites it, or for which apparently it has been cited on other occasions. It is quite true that in his judgment in that case Stuart V.-C. said that "he conceived, if the Crown was adversely claiming against the stakeholders, that they had a right, when other persons were claiming the same money, to file a bill of interpleader, and to make the Crown a defendant to the bill, because the Crown was one of the parties who were vexing them by contesting the right. The question of title had not been seriously argued, and he did not decide it one way or the other; but he should not hold that the Crown was an improper party. He thought the bill had been rightly framed, in bringing all the claimants before the Court." When one looks at the facts of that case one finds that it was a suit instituted by the plaintiffs against four defendants claiming the return or the payment of a

(1) 6 Jur. (N. S.) 267, 268.

certain sum of money, or a direction that the defendants might be decreed to interplead, and one of the four defendants so added, apparently was the Crown—in what form we do not know. It may have been in the form of an action against the Attorney-General, but that does not appear. But whatever form the action was in, it is manifest I think that whoever was made a defendant as representing the Crown, consented to the jurisdiction, and appeared, and, therefore, was a party properly before the Court. It was in those circumstances that Vice-Chancellor Stuart made the observation he did and made the order he did.

It seems to me that that case has no application to the present or any similar case where the Crown is objecting that it ought not to be made a party, and that there is no jurisdiction to make an interpleader order as against the Crown. There are, on the other hand, in *Candy* v. *Maugham* (1) very clear dicta by the learned judges who were parties to that decision, that interpleader would not lie against the Crown, and for the reason which Hill J. has given—a much broader and deeper reason—namely, that the Court cannot make an order either directing an issue against the Crown or barring the claim of the Crown.

The other point taken by Mr. Mackinnon does not seem to me to be open upon these proceedings. That point is that it is competent for these parties, or a party under similar circumstances, to bring an action against the Attorney-General claiming a declaration as to the rights of the execution creditors. That may or may not be so : I express no opinion about it. All I need say is that it does not seem to me that in proceedings where an interpleader summons has been taken out by the sheriff, asking and only asking that the Crown may appear and state its claim and be a party to an interpleader, it is competent upon such a summons to take the course suggested by Mr. Mackinnon, and to treat this as though it were an action against the Attorney-General claiming a declaration of the rights of the execution creditors.

In my opinion the appeal fails. We are not asked to give

(1) 6 Man. & G. 710.

C. A. 1922

THE MOGILEFF (No. 2).

any direction that the sheriff shall remain in possession. The order, therefore, will simply be that the appeal is dismissed with costs and that so far as the sheriff is concerned his costs will be added to the costs of the execution creditors.

SCRUTTON L.J. I agree that in the matter which is now before the Court we cannot do anything else than dismiss the appeal. I desire, however, to say that it seems to show the extreme advisability of action by the Committee which it is stated has been appointed under the presidency of the Attorney-General to consider in what respects the rights of the Crown should or should not be altered by legislation; for I cannot help feeling that the objection that has been taken by the Crown in this case, which I think is a good objection in law, has the effect of preventing an order of the Court being enforced, and of delaying justice to one of His Majesty's subjects. However, all this Court can do is to enforce the law, and not to express any opinion on the desirability of the action taken by the Crown of insisting on its legal rights.

The case comes before the Court on an interpleader summons that the plaintiffs and the claimant shall appear and state the nature of their claims, and maintain or relinquish the claim. The plaintiffs are persons who have got a judgment in rem against the owners of a particular ship, and have obtained a writ of fi. fa. in respect of other ships which they allege to be the property of the judgment debtors. The Crown has stated to the sheriff that the Crown itself is the owner of the property seized, and therefore has requested him not to proceed under the writ of fi. fa. The sheriff has taken out a summons that the plaintiffs and the claimant—which must mean the Crown, as the title is "His Majesty represented by the Shipping Controller"—shall appear and shall maintain or relinquish their claim. The Crown does not consent to the Court making the order. It appears to me, therefore, that the Court has no jurisdiction to make an order adverse to the Crown without the Crown's consent.

In my view the interpleader rules, which have the force of

C. A. 1922

THE MOGILEFF (No. 2).

Scrutton L.J.

statute, do not bind the Crown. The principle, I think, is that statutes do not bind the Crown in any case where they would affect any existing prerogative or interest of the Crown, unless either express words or necessary implication compel the Court to come to that view. There are no express words applying the interpleader rules to the Crown, and I cannot see that there is any necessary implication. In those circumstances I think that the interpleader rules do not bind the Crown.

I should come to that conclusion without authority, but as far as authority is concerned, I think the Court of Common Pleas in *Candy* v. *Maugham* (1) did decide, as far as the Interpleader Act was concerned, that the Crown was not bound by the existing Interpleader Act. The further point was then argued by Serjeant Manning, which was that if the Interpleader Act did not apply, apart from the Interpleader Act the Court had power to interfere. His argument in the report, edited by himself, and therefore I expect accurately stated, is that: "Wherever the Court sees that the Crown, though no party to the record, has an interest in the matter in suit, they may pronounce judgment for the Crown. And if a presumption of title only appears for the Crown, the Court will, in some cases, proceed to give judgment in the action; but will suspend execution until the party has interpleaded with the Crown. For these positions a variety of authorities will be found collected in Manning's Exchequer Practice, 2nd ed., 126." Then follow a number of authorities. I have looked at Manning's Exchequer Practice, and for the passage:—"If a presumption of title only appears for the Crown, the Court will . . . . suspend execution until the party has interpleaded with the King"—only one authority is cited—namely, *Adam Penreth's Case* (2), decided in 29 Edward I. We have not been referred to that report. But I notice that Maule J. in *Candy* v. *Maugham* (3)

(1) 6 Man. & G. 710, 711; 13 L. J. (C. P.) 17.

(2) (1301) Trin. 29 E. 1. [In Memor. in Scacc. prefixed to Y. B. Ed. II., 1678, p. 42.]

(3) 6 Man. & G. 710; 13 L. J. (C. P.) 17.

C. A. 1922

THE MOGILEFF (No. 2).

Scrutton L.J.

asked the question how was the Court put in motion, and Serjeant Manning reports himself as answering that "the Court proceeded sometimes on the suggestion of the King's serjeants, sometimes proprio motu." In the Law Journal he is only reported as answering that "the Court proceeded proprio motu," to which Maule J.'s reply is: "Then this can hardly be the proper subject of a motion from the bar"—i.e., it is only in the power of the Court, and not in the power of any party to come to the Court and say "Make the order." As stated by Serjeant Manning, and I have no doubt more accurately stated, if it is done on the suggestion of the King's Serjeant the Crown waives its privileges, and if "proprio motu" it is not open to some party to the action to come to the Court and say as of right "Exercise these powers."

It seems to me, therefore, that as matter of strict law the summons taken out by the sheriff was wrong because, adversely to the Crown, it required the Crown to appear and to maintain or relinquish its claim. I therefore think that this appeal must be dismissed, though, as I have said, I feel that the result of the action taken by the Crown in this case is to delay justice to a British subject. That, however, is not a matter for this Court.

I express no opinion as to the rights and duties of the sheriff, which are not before us. The sheriff has got a writ to execute, and if he determines not to execute it that will be, as Mr. Gregory says, at his risk. We are not deciding one way or the other in the circumstances of this case whether the sheriff is, or is not, entitled to withdraw.

ATKIN L.J. I agree. This is a summons taken out by the sheriff under Order LVII. of the Rules of the Supreme Court. That Order took the place of the statutory provisions under the Interpleader Act of William IV., and the provisions of the Common Law Procedure Act, 1860. It is an Order which provides for the originating of process by a stakeholder, or by the sheriff, and it gives power to the Court to exercise coercive authority over the persons who are brought before

it by an interpleader summons—namely, the sheriff himself and the claimants. I think it only necessary to refer to the rules to show that there is a complete code by which in the first place the summons calls on the claimants to appear and state the nature and particulars of their claim, and to maintain or relinquish it. The rules then proceed to give power to the judge to order that the claimant be made a defendant in the action, or that an issue be tried, and to direct which of the claimants be plaintiff, and in a suitable case the Court has power to decide the matter in a summary way. If the claimant has been served, and does not appear—that is to say, if the Crown in this case having been served did not appear—the Court may make an order declaring the claimant, and all persons claiming under him, for ever barred, and there are many other provisions, including a provision as to costs. It appears to me quite plain that the Order does not bind the Crown, and is not intended to give, and does not give, the Court the coercive jurisdiction against the Crown that it plainly has against claimants who are properly brought before it on an interpleader summons.

That is sufficient to dispose of this case, but I think it is very unfortunate that it should be so, because not only is the subject delayed in obtaining the amount of money for which the Court has decided he is entitled to have judgment, but also the sheriff, a very important public officer of the Crown, is harassed by reason of the difficulties that he is put into as to the course that he should take. Nevertheless that seems to me to be the position at present. I say nothing as to whether there is any other process of law by which the execution creditor can have the matter determined as against the Crown, or as to the rights of the execution creditor against the sheriff, or of the sheriff against the execution creditor. The position merely remains that according to our decision the sheriff is not in a position to take out an interpleader summons making the Crown a claimant. We determine nothing else as to the rights of the parties at all.

I agree that the learned judge's judgment is right for the reasons that have been given by him, and that this

C. A. 1922

THE MOGILEFF (No. 2).

appeal should be dismissed with costs. I also agree with the order made by my Lord protecting the sheriff as regards his costs.

Appeal dismissed.

Solicitors for the plaintiffs: *Downing, Middleton & Lewis.*
Solicitor for the Crown: *The Solicitor to the Board of Trade.*
Solicitors for the Sheriff: *Taylor, Jelf & Co., for Burton, Scorers & White, Lincoln.*

E. C. M. T.

1922
Feb. 20, 27.

PROBATE.

In the Estate of GREY.

Probate—Soldier's Will—"In actual military service"—On an Expedition—Termination of the Expedition—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 11—*Wills (Soldiers and Sailors) Act,* 1918 (7 *& 8 Geo.* 5, *c.* 58)—*Termination of the Present War (Definition) Act,* 1918 (8 *& 9 Geo.* 5, *c.* 59).

The words "in actual military service" in the Wills Act, 1837, s. 11, are now settled to be equivalent to "on an expedition." The service may continue after the fighting is over, but the man on such service must be either on a field of operations, or proceeding to or from the field, or in some place for the purpose of proceeding there. Duration of actual service is a matter of fact to which the date at which the war is declared to be terminated by proclamation under 8 & 9 Geo. 5, c. 59, is irrelevant.

THIS was a motion for probate of the will of Charles Joselyn Eden Grey as a soldier's will under s. 11 of the Wills Act, 1837.

Grey was, on the outbreak of war, attached to the Royal Flying Corps. In October, 1914, he was taken prisoner at Peronne and remained a prisoner of war in Germany until October, 1918, when he returned to England and was posted as an officer in the 5th (Reserve) Battalion of His Majesty's Grenadier Guards. In January, 1919, he was sent on active service with the Royal Air Service in Russia. He returned to England in November, 1919, and was then posted as major to the 2nd Battalion of the Grenadier Guards. On May 9, 1921, he was sent to King Edward's Hospital, Grosvenor

1922

GREY, *In the Estate of.*

Crescent, in order to undergo an operation rendered necessary by the treatment he had received in Germany. On the same day he made a will in the usual legal form, which he had apparently taken from a former will, which he then destroyed. He had written out the usual full attestation clause, and signed the will, but it was not witnessed. He died in hospital on May 15, 1921.

There was some evidence that the battalion was liable at any time to be sent on active service to Ireland or the Rhine.

This motion was made on behalf of the executrix and residuary legatee named in the will. Consents were produced from the next of kin of the deceased to the question being decided on motion.

By Order in Council, 1921, No. 1276, dated August 10, 1921, it was ordered that August 31, 1921, should be treated as the date of the termination of the war.

Noel Middleton for the motion. It has been held that the words in the Wills Act, 1837, s. 11, "in actual military service," must be taken as equivalent to "in expeditione" in the Roman law: *Drummond* v. *Parish.* (1) But those words have been unnecessarily narrowed by the translation "on an expedition"; and it has been held that a very liberal interpretation must be given as to the point when the expedition begins: *In the Goods of Hiscock* (2); *Gattward* v. *Knee.* (3) *In re Limond* (4) shows that the expedition may continue though the fighting is over.

Most of the cases on the subject are discussed in *Godman* v. *Godman* (5), but the decision there turned on a point which does not arise here.

Cur. adv. vult.

Feb. 27. HILL J. The question is whether the document signed by deceased, Major Grey, on May 9, is to be admitted to proof as a soldier's will. It is in form a will, has an

(1) (1843) 3 Curt. 522.
(2) [1901] P. 78.
(3) [1902] P. 99.
(4) [1915] 2 Ch. 240.
(5) [1920] P. 261.

1922

GREY, *In the Estate of.*

HILL J.

attestation clause, but witnesses are wanting. It is written by deceased in his own hand on paper of the Travellers' Club. It is signed by deceased. It is dated May 9, 1921. On that day deceased entered hospital in order to undergo an operation. He died on May 15, 1921. The document appears to be a record of the deliberate and final expression of the testator's wishes with regard to his property. It is stated in the affidavit that the Grenadier Guards were at that time liable for service abroad and were under standing orders to proceed to Ireland.

It is contended that it is a valid will as the will of a soldier being in actual military service. He had served in the war, had been a prisoner in Germany, and had subsequently taken part in the expedition to Northern Russia. But from early in 1920 up to May 9, 1921, he was stationed with his battalion of the Grenadier Guards in London, and living in barracks.

Ever since the judgment in *Drummond* v. *Parish* (1) it has been settled that the Act does not apply to every soldier, but only to a soldier who is "on an expedition." Where that relation begins and where it ends must be decided by the circumstances of the particular soldier. As to the point at which a soldier begins to be on an expedition, *In the Goods of Hiscock* (2) shows that a liberal interpretation must be given. A soldier was there held to be on an expedition from the time he took the first step of going into barracks with a view of being drafted to the front. That rule has often been applied in regard to wills made during the late war. *In re Limond* (3) likewise shows that a liberal interpretation must be given as to the point at which a soldier ceases to be on an expedition. In that case the military operations were undertaken for the opening up and occupation of the Tochi Valley, and the delimitation of the frontier was an operation incident to the war in question. The soldier was at the time he made the will part of the military escort to the delimitation party. He was held to

(1) 3 Curt. 522. (2) [1901] P. 78.

(3) [1915] 2 Ch. 240.

1922

GREY, *In the Estate of.*

HILL J.

be within the privilege because the actual military service did not cease until the full conclusion of the operations.

But giving the most liberal interpretation, I fail to see how it can be said that Major Grey was on an expedition in May, 1921. He was neither in the field, nor proceeding to or from the field, nor in any place for the purpose of proceeding to or from the field. I can see no material distinction between his situation and that of Major-General Drummond in *Drummond* v. *Parish.* (1)

It was argued that every soldier was on an expedition in May, 1921, because at that date the Order in Council had not yet been made declaring the date which was to be treated as the date of the termination of the present war under the Termination of the Present War (Definition) Act, 1918. That matter seems to me to be irrelevant: (1.) for a soldier to be in actual military service it is not sufficient that there should be a state of war; he must be in some place for the purposes of the war; and (2.) "actual military service" refers to a state of fact, not to a date artificially fixed by Act of Parliament or Order in Council.

Probate of this will must therefore be refused.

Solicitors: *Hunter & Haynes.*

(1) 3 Curt. 522.

J. R. B.

C. A.
1922
Feb. 13.

[IN THE COURT OF APPEAL.]

RUTHERFORD *v.* RUTHERFORD.

RICHARDSON (INTERVENER).

Divorce—Wife's Petition—Adultery charged against one Person on one specified Occasion—Suit not defended by Husband—Intervention of Person charged—Decree nisi granted—Appeal by Intervener—Intervener dismissed from Suit—Effect on Decree nisi—Petition dismissed—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 29, 30.

A petition was presented by a wife for dissolution of marriage on the ground of her husband's cruelty and his adultery with R. on one specified occasion. The husband did not defend, but R. obtained leave to intervene and filed an answer denying misconduct. The suit was heard before Branson J. sitting without a jury. The husband did not appear and was not represented at the trial. Evidence was given by and on behalf of the petitioner and by the intervener. During an adjournment of the Court the intervener voluntarily submitted herself to medical examination and medical evidence was given on her behalf. Branson J. held (1.) that the husband had committed adultery with the intervener and (2.) that the intervener had committed adultery with the husband and granted the wife a decree nisi. The intervener appealed, and asked that the decree should be set aside and judgment entered for her. The Court of Appeal held that the intervener had not committed adultery with the husband and dismissed her from the suit. The Court subsequently made an order directing the King's Proctor to argue the question whether under those circumstances the decree nisi could stand:—

Held, that the only issue in the suit was whether the Court, looking at the whole of the evidence, was satisfied that the alleged adultery had been committed, and that having regard to its finding on the intervener's appeal the Court must hold that it was not so satisfied.

Held, therefore, that notwithstanding there was no appeal by the husband, the decree must be set aside and the petition dismissed.

APPEAL from an order of Branson J. sitting in the Divorce Division without a jury.

On August 4, 1920, the petitioner Maude Mary Rutherford filed a petition for dissolution of her marriage with her husband, Lieutenant-Colonel Norman Cecil Rutherford, on the ground of his cruelty and adultery. By her petition she alleged (inter alia), para. 5: "That the said Norman Cecil Rutherford has frequently committed adultery with women whose names are unknown to your petitioner." Para. 6: "That

on an occasion about the end of August or the beginning of Sept. 1916 at Frith Manor, Mill Hill, in the County of Middlesex, the said Norman Cecil Rutherford committed adultery with Amy Elizabeth Richardson."

The petitioner and the respondent were married on August 27, 1902, and there were six children of the marriage.

The citation was served upon the respondent personally at Broadmoor Criminal Lunatic Asylum, where he was confined as a criminal lunatic, having been convicted of murder, but found to be insane at the time he committed the act.

An appearance was entered for the respondent by his solicitors, who applied for particulars of the charges in the petition, but took no further steps on his behalf. No answer was filed by the respondent.

Miss Richardson, with whom the adultery was alleged, obtained leave to intervene, and on February 16, 1921, filed an answer denying the allegations made against her.

On June 9 and 10, 1921, the suit was tried before Branson J. sitting in the Divorce Division. The respondent did not appear and was not represented at the trial. Evidence was then adduced on behalf of the petitioner. No evidence was called in support of the charge of adultery with women unknown contained in para. 5 of the petition, but evidence was given by and on behalf of the intervener. During an adjournment of the Court she voluntarily submitted herself to a medical examination, and medical evidence was given on her behalf.

On June 14, 1921, Branson J. delivered his considered judgment. He found: (1.) that the respondent had been guilty of cruelty; (2.) that he had committed adultery with the intervener; and (3.) that the intervener had committed adultery with the respondent. He accordingly granted a decree nisi for dissolution of the marriage, gave the petitioner the custody of the children, and directed the respondent and the intervener jointly to pay the costs of the trial.

The intervener appealed, and by her notice of appeal asked for an order reversing and setting aside the judgment and decree given and pronounced in the suit and ordering that

C. A. 1922

RUTHERFORD v. RUTHERFORD

judgment be entered for the intervener with the costs of the trial and of the appeal.

The appeal came on for hearing on November 29 and 30, and in the result was allowed with costs, the Court of Appeal holding in the words of Atkin L.J. that "the petitioner had wholly failed to establish the allegation which she had set out to prove that adultery had been committed between the intervener and the respondent." The question as to the effect of this finding in regard to the decree nisi pronounced against the respondent was reserved for further argument, it being suggested to the Court that the King's Proctor could be called in to argue the question. No order was then made, but on December 20, 1921, the case was again mentioned in the Court and an order was then made under s. 5 of the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), that the papers in the suit should be sent to the King's Proctor in order that he might argue whether or not the decree nisi pronounced in the suit "shall be deemed valid and effectual in law notwithstanding the finding of the Court of Appeal."

On February 13, 1922, this question came on for argument.

Sir Gordon Hewart A.-G. and *Noel Middleton* for the King's Proctor. The question whether the dismissal from the suit of an intervener by the Court on her appeal has the effect of annulling the decree is raised in the clearest and most acute form in this case. It is quite a common thing in practice in the Divorce Division for a divorce petition to fail because there is not sufficient evidence to prove adultery between the respondent and the co-respondent or the intervener. In those cases no legal or logical difficulty arises. But there are many cases where the petitioner succeeds against the respondent, but fails as against the co-respondent or intervener. The act of adultery involves the act of two persons, and prima facie it is hard to say that A can be found to have committed adultery with B and that B cannot be found guilty of adultery with A. At the first blush it looks odd, but it looks less so when it is remembered that the question, after all, is not one of fact, but one of proof of fact. In the

present case the question arises in an acute form because the adultery is alleged on a date more or less definitely indicated. Branson J. was satisfied that the petitioner had established her case, but when Miss Richardson appealed to this Court the Court was satisfied not only that the evidence against her failed, but that she was entitled to be described as innocent. There is all the difference between a verdict of not proven and one of not guilty. According to this Court's finding this is not a case of not proven but a case of not guilty in every sense of the term. That brings in this curious and rare result that there are two contradictory findings upon a single relevant issue of fact. The logical difficulty is that the finding of adultery against the respondent depends upon the finding with reference to the intervener. There is only one finding in the decree granted: "That the petitioner has sufficiently proved the contents of the said petition," which were an allegation of adultery on one specific occasion, and it is submitted that the decision of this Court puts an end to that finding.

[ATKIN L.J. The issue of adultery was a simple issue, and this Court has negatived it.]

In her notice of appeal the intervener asked for an order reversing and setting aside the judgment below and the decree pronounced, and this Court unanimously allowed that appeal.

[LORD STERNDALE M.R. Are there any cases where the wife was found to have committed adultery with the co-respondent and the co-respondent was found not to have committed adultery with the wife?]

There are such cases.

[LORD STERNDALE M.R. Is there any case where on the wife's petition only one act of adultery has been charged against the husband, and there has been a finding that the intervener did not commit adultery with him, and the decree has still been granted?]

So far as we know there is no such case.

Robinson v. *Robinson and Lane* (1) is the first case that

(1) (1858) 1 Sw. & Tr. 362, 365, 380, 384.

C. A. 1922

RUTHERFORD v. RUTHERFORD

established the principle that one party might be dismissed from the suit, notwithstanding that the innocence of the other was not established. The question is one which must depend on the evidence in each particular case. If certain evidence which is admissible against one of the respondents is not admissible against the other it may be that one may be found to have committed adultery and the other not to have done so. In *Collins* v. *Collins and Deal* (1) Shearman J. granted the husband a decree nisi, being satisfied with the honesty and truth of the confessions of the wife, and dismissed the co-respondent from the suit. In *Hartley* v. *Hartley and Fleming* (2) on a husband's petition for divorce evidence was given that the wife had confessed to adultery with the co-respondent, and on the trial of the husband for attempting to murder her had admitted in cross-examination that she had been living with the co-respondent, and it was held that the admission was more than a confession and justified the Court in granting a decree nisi. Nothing was there said as to the co-respondent. In proper cases orders have been made that the case against the co-respondent should be tried separately from the case against the respondent: *Cox* v. *Cox, Reade and Tobin* (3); *Miller* v. *Miller and Fowler* (4), and where such an order is made a co-respondent may be found not guilty of adultery with the respondent, and a respondent may be found guilty with the same co-respondent even in respect of the same act of adultery: *Long* v. *Long and Johnson.* (5) It is purely a question of evidence: *Robinson* v. *Robinson and Lane* (6); *Crawford* v. *Crawford and Dilke* (7), and it is submitted that the practice is a sound practice and based upon common-sense.

Although the intervener has here asked by her notice of appeal that the decree nisi should be set aside she does not now do so, and a question may arise as to the power of the Court in those circumstances to set it aside.

(1) (1916) 115 L. T. 936.
(2) (1919) 35 Times L. R. 298.
(3) (1871) L. R. 2 P. & M. 201.
(4) Times Newsp., Mar. 9, 1905; July 23, 1907.
(5) (1890) 15 P. D. 218.
(6) 1 Sw. & Tr. 362.
(7) (1886) 11 P. D. 150.

[ATKIN L.J. What is the position where the respondent is not a party to the appeal ?]

It is submitted that the intervener is really in the position of a respondent and may ask that the decree should be set aside, and even if she ceases to do so the Court having seisin of the matter, it is its duty to satisfy itself that the alleged adultery has been committed, and if it is not so satisfied it must dismiss the petition: Matrimonial Causes Act, 1857, ss. 29, 30, 31. The King's Proctor intervenes as a member of the public: Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7. That is not the case here. The King's Proctor is not here intervening, but is appearing by the direction of the Court under s. 5 of the Act of 1860.

The position of an intervener is made clear by s. 28 of the Act of 1857, and a right of appeal is given by s. 56.

[ATKIN L.J. referred to s. 3 of the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12).]

Whether Miss Richardson intervened under the Act of 1857 or the Act of 1907 she is entitled to ask that the decree nisi should be set aside. That however is not the question which now arises but is whether the decree can be deemed valid and effectual in law, and that is a question for the Court to decide. The present case, it is submitted, looks as if it were a case in which no loophole is left for the decree to escape because the finding of fact upon which it was based has been expressly negatived by a superior Court. In other words it seems both legally and logically impossible that the decision of the Court of Appeal can exist side by side with the decree which was pronounced by the judge below.

Bayford K.C., *Cotes-Preedy* and *R. Bush James* for the petitioner. It is submitted that the decree nisi should stand. There are here two findings of fact (1.) that the respondent has committed adultery with the intervener and (2.) that the intervener has committed adultery with the respondent. These two findings stand on different footings. The fact that one was negatived by the Court of Appeal does not necessarily destroy the other. Branson J. has found the adultery of the respondent as a fact and has said that he had no difficulty in

C. A. 1922

RUTHERFORD v. RUTHERFORD

so finding. Further, evidence was given on this issue that the respondent had himself admitted that he had been in bed with the intervener, and the judge below drew inferences of guilt from the facts. *Long* v. *Long and Johnson* (1) was a case where there were two opposite findings of fact.

[LORD STERNDALE M.R. There was no decree in that case and therefore it is not an authority that the decree ought to stand.]

There are cases in which a decree has been made against the respondent but the suit has been dismissed as against the co-respondent. It is submitted that a decree based upon a finding of fact by the judge below and not appealed against must stand.

In the cases cited there was a finding in law of not guilty. The fact that the Court has found on one issue in favour of Miss Richardson is not a ground for setting aside the decree nisi.

Sir Gordon Hewart A.-G. in reply referred to the judgment of Fletcher Moulton L.J. in *Harriman* v. *Harriman*. (2)

LORD STERNDALE M.R. This case arises in peculiar circumstances which I hope are not likely to occur again. The petition was a petition by a wife against her husband for a divorce on the ground of his cruelty and adultery. The husband did not file any answer, possibly because at the time the proceedings were going on he was confined in a criminal lunatic asylum, in consequence of his having been found guilty of the act of murder, but insane at the time he committed the act.

The cruelty alleged is a matter with which we are not now concerned and as to which therefore it is unnecessary to say anything.

The adultery charged as having been committed was adultery with a lady of the name of Richardson. There was also an allegation of adultery with other women unknown, but that allegation has been abandoned. The allegation in question was: [His Lordship read para. 6 of the petition and

(1) 15 P. D. 218. (2) [1909] P. 123, 142.

continued :] After the proceedings had been continued for some little time Miss Richardson on February 11, 1921, obtained an order giving her liberty to intervene and filed an answer denying the allegation. That order seems to have been made under s. 3 of the Matrimonial Causes Act, 1907, and it probably has very much the same effect as if it had been made under s. 28 of the Matrimonial Causes Act, 1857.

The suit was tried before Branson J. sitting without a jury, and evidence was then given with regard to certain admissions of conduct by the husband from which adultery might very fairly be inferred. It is not quite correct to say that he admitted adultery; he did not; but he admitted conduct, which if it had taken place, might certainly have justified an inference of adultery. To his wife he is alleged to have said that he admitted that he had been in Miss Richardson's bedroom and in her bed. Dr. White in his evidence stated that he told the respondent that the petitioner had informed him that he had been in Miss Richardson's room at night and in answer to the question "What did he"—that is the respondent—"say about that?" Dr. White said: "He admitted it and he admitted he had been in bed with Miss Richardson. (Q.) Did you ask him that? (A.) I did and he admitted it. (Q.) Did he admit intercourse with her? (A.) No, he did not," and then Dr. White went on to say, not unreasonably, that he told the respondent that if he had been in bed with her and the case came before a jury there would not be much use in saying he had not had connection with her. Then a little later on in his evidence, in order to make the matter clear, he was asked to repeat the statement. The question asked him was: "To make it quite clear perhaps you might repeat it"—that is the statement with regard to Miss Richardson—"(A.) I said from what Mrs. Rutherford had told me he had been in Miss Richardson's bedroom at night, and he said: 'Yes, I did.' Then I asked him: 'Was there any sexual intercourse?' and he said: 'No.'" Then Dr. White repeated that he told him that nobody would believe him. It is to be observed that in the second version that he gave of the statement he does not

C. A. 1922

RUTHERFORD v. RUTHERFORD

Lord Sterndale M.R.

say that the respondent had said that he had been in bed with her, but that he had been in her bedroom. It was not disputed at the trial that he had been in her bedroom. The intervener admitted that, but said that she turned him out as soon as she could, and that nothing improper had taken place between them. Branson J., without any hesitation, came to the conclusion that the respondent had committed adultery with Miss Richardson, and he then proceeded to say that he must also be satisfied that Miss Richardson had committed adultery with the respondent.

There are cases no doubt in which there have been said to be two issues—generally in a husband's petition where there is a wife and a co-respondent, but I do not think that it is right to say that there is no material distinction between a husband's petition and a wife's petition—one whether the respondent has committed adultery with the co-respondent and the other whether the co-respondent has committed adultery with the respondent, and there are cases in which there has been a decree granted because of a finding of adultery by the respondent where there has been no finding of adultery by the co-respondent. That has nearly always arisen in this way. Of course a statement made by a respondent that she has committed adultery is not evidence against any one but herself, and therefore a decree has been granted on a finding of adultery based on that admission, whereas there could be no finding of adultery against the co-respondent because that admission was not evidence against him. But whether you call it two issues or one, in order to see what the Court has to be satisfied about one must look at the Matrimonial Causes Act, 1857. That Act by s. 29 provides: "Upon any such petition"—that is either the petition of the wife or the husband—"for the dissolution of a marriage, it shall be the duty of the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged"—that is as to the facts as to the adultery—but also whether there has been connivance or collusion, or other circumstances. Then s. 30 provides: "In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has

been committed, or shall find "—a number of other matters—then "the Court shall dismiss the said petition." In the present case a considerable body of evidence was called on both sides for the petitioner and the intervener. As I say, the respondent did not appear, and therefore no evidence was called on his behalf. But it is hardly necessary to say that a divorce suit differs from an action at common law inasmuch as the failure to file an answer does not justify a decree being made without evidence, as the failure to put in an answer at common law might justify a judgment being entered by default. Therefore the question—I will not call it the issue, because that might be misleading—whether adultery has been committed or not, and whether the Court is satisfied that adultery has been committed, has to be tried even although the respondent has not filed any answer. The learned judge came to the conclusion on what he called the second issue—namely, whether Miss Richardson had committed adultery with the respondent, that it was proved that she had, and that he was satisfied that she had.

The intervener appealed, and on the appeal this Court came to the conclusion, differing from Branson J., that it was not proved, and that the evidence before the Court did not satisfy this Court, and ought not to have satisfied the Court below, that Miss Richardson had committed adultery. That, of course, disposes of the case, so far as Miss Richardson is concerned.

But then it was said that even granting that to be so, there was evidence against the respondent on which a decree might have been made against him; that he had not appealed, and therefore that the decree must stand, although the Court was not satisfied that any adultery had been committed by Miss Richardson. I think that is a fallacy. No case nearly resembling in its circumstances the present case has been cited to this Court. I think it is a fallacy for this reason. As I say, it does not seem to me to matter very much whether you call it one issue or two issues. However you divide the matter up it comes back to this, that "In case the Court, on the evidence in relation to any such petition shall not be

C. A. 1922

RUTHERFORD v. RUTHERFORD

Lord Sterndale M.R.

satisfied that the alleged adultery has been committed," it shall dismiss the petition. I think that those words mean that the Court may look at the whole of the evidence with regard to the petition, by whomsoever it may be brought and against whomsoever it may be evidence (always having regard to the condition that it is not allowed to have any effect against any person against whom it is not legal evidence). The Court must look at the whole of the evidence, and I think, if Branson J. had come to the conclusion that we did on the evidence that was called before him, he ought to have said: "Taking the whole of the evidence—both the evidence called by the intervener and also the evidence of admissions against the respondent—I am not satisfied that adultery has been committed, and I dismiss the petition." That I think is the position, and I do not think that dividing the matter up into two issues can make any difference to that position. The Court must judge upon the whole of the evidence that it has before it.

I am speaking here only of a case where the Court has the whole of the evidence before it, and not of a case where there is a division, one part of the case being tried by a jury and the other part by a judge, nor, as was suggested in argument, of a case tried on two different occasions, perhaps by different judges. When those cases arise we will deal with them. I am taking here a case where the whole matter is tried before the same judge at the same time, and I can see no reason for saying that, so far as concerns the respondent, he must shut his eyes to all the evidence that has been called and heard before him, and say that he will take an admission of the respondent by itself, without considering the rest of the case. In my opinion that is wrong, and I think, having regard to the finding at which this Court arrived with regard to the intervener's appeal, that this Court should say that it is not satisfied that the adultery has been committed, and therefore that the petition should be dismissed.

It may be, I daresay it is, very hard from one point of view upon the petitioner. But after all I do not know that there is any very great hardship if a petitioner launches a

petition upon evidence that does not satisfy the Court that a decree should be made.

I think this petition should be dismissed.

WARRINGTON L.J. I am of the same opinion. The question we have to decide to-day is whether, notwithstanding the result of the intervener's appeal, the decree made by the Probate and Divorce Division dissolving the marriage between the petitioner and the respondent ought to stand.

Now the first matter which it is important to notice is that, as the result of the proceedings, the question whether or not the petitioner was entitled to a decree for dissolution depended upon her proving one fact, and one fact only—namely, the alleged act of adultery on a particular day between the respondent and Miss Richardson, who was afterwards allowed to intervene. There was no question about any general charge of adultery against the respondent. It was limited to that one fact and that one fact only.

The Matrimonial Causes Act of 1857 provides by s. 29: [His Lordship read s. 29 and also s. 30 and continued:] In *Harriman* v. *Harriman* (1) Fletcher Moulton L.J. stated his view of the meaning of s. 31: "By s. 31 of the Matrimonial Causes Act, 1857, the relief is made dependent on the Court being satisfied on the evidence that the case of the petitioner has been proved. 'Proved' here means proved as a fact, and not merely proved inter partes. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The Court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them." It seems to me that that is a most important pronouncement as to the effect of those sections. The Court has to be satisfied that the fact of adultery is proved as a fact and not merely proved as it might be in a common law action, to such an extent that one of the parties is prevented from denying it. Has the fact of adultery between the respondent and the intervener been proved as a fact in this case? In my opinion it has not. This Court

(1) [1909] P. 123, 142.

C. A. 1922

RUTHERFORD v. RUTHERFORD

Warrington L.J.

on the appeal of the intervener has held that, looking at the evidence which was admissible against her, she has disproved the allegation made against her. I have said advisedly, "looking at the evidence which was admissible against her," because there was one additional piece of evidence which was admissible against the respondent, but not admissible against the intervener. That was the evidence of the admissions, so called, of the respondent. For the present purpose it seems to me, whether one treats the issues as two separate and distinct issues, as I think they are not, or as one issue, as I think it is, in whichever way one looks at it, one has to take into account that further piece of evidence, which was not admissible on the previous occasion. But taking that further evidence into account and seeing what its nature was, I am clearly of opinion that the rest of the evidence was sufficient to render it of no substantial importance.

I think looking, as we are bound to look, at the whole of the evidence before the Court, the only conclusion we can come to is that the learned judge ought not to have found as expressed in the formal decree that the allegation in the petition was proved. He ought to have found that it was disproved, or rather to follow the words of s. 30, he ought to have found that he was not satisfied on the evidence that the alleged adultery had been committed, and not being so satisfied he ought to have dismissed the petition. I think that is the course that ought now to be taken.

ATKIN L.J. I agree. This was a petition presented by the wife for dissolution of marriage in consequence of the husband's adultery coupled with cruelty. And I think that it is important to repeat what is very well known in the law, but does not seem to be always remembered outside the law, that the right to a dissolution of marriage rests in this country entirely upon statute, and cannot be enforced except upon statutory grounds, and that a Court of justice has no power to award a dissolution of marriage unless by proper judicial procedure the statutory grounds are established to its satisfaction. In this case the wife has alleged the grounds

as given by the Matrimonial Causes Act, 1857, s. 27: "It shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of . . . . adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro." In that petition the only allegation that she made which is relevant to this question (because it is the only allegation that was said to be supported at the hearing of the petition) was an allegation in para. 6 of the petition. [His Lordship read the paragraph and continued:] The ordinary procedure was followed. The husband entered an appearance and made an application for particulars of some of the allegations. He then took no further part in the proceedings; he was, in fact, confined in a criminal lunatic asylum. Before the case came on for hearing, Miss Richardson, with whom the adultery was alleged, obtained leave to intervene at the trial, and she filed an answer denying that that allegation was true. The case then came on for hearing before the learned judge.

Now, it appears to me that at that hearing there was one issue, and one issue only—namely, the issue alleged in the petition, that the respondent, the husband, had committed adultery with Miss Richardson. There are cases in which it would be perfectly right to say that two issues are raised in a divorce petition, because a husband may allege that his wife has committed adultery, in which case he must, if he knows the alleged adulterer, make him, as the Act says, a "respondent," or what we now call him, a "co-respondent." But he may also, in addition to that allegation, claim something quite distinct from relief of dissolution of his marriage—namely, damages against the co-respondent, on the ground of his having committed adultery with his wife; and that is the statutory right which is provided by s. 33 of the Matrimonial Causes Act, 1857, which gives the husband the same relief as he had at common law in an action against the adulterer for criminal conversation, and such claim is to be made, "heard and tried

C. A. 1922

RUTHERFORD v. RUTHERFORD

Atkin L.J.

on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of common law." If a claim for damages is made against the co-respondent it is plain that there are two issues. One issue is whether the wife has committed adultery with the co-respondent, and the other is whether the co-respondent is liable to the husband for damages for having committed adultery with his wife; and it appears to me that except where there is such a claim as that, there is only one issue raised where the petitioner is merely seeking dissolution of his or her marriage. No such issue is raised in a suit in which an additional party other than the other spouse has been added, where it is the wife's suit, and where the other woman, the intervener, intervenes. It is perfectly true that in accordance with our rules of evidence an issue may be proved as against one party and not proved against the other, because evidence may be admissible against the one and not against the other. It appears to me that that difference of proof does not amount to raising two issues, but only to two different degrees of proof of the same issue. That accounts for the odd result, as it must appear to a person who is not familiar with the rules of evidence, that in a case where the husband alleges adultery by the wife with the co-respondent, the husband may establish the charge by evidence against the wife, and yet fail to establish it against the co-respondent, because the wife may have made admissions which are admissible against her, but which are not admissible against the co-respondent, and such admissions may amount to the sole proof. In that case, the mere fact that admissions are made by the wife is not sufficient to entitle the petitioner to a decree, but the Court must be satisfied that the admissions themselves are true. The Court may be satisfied by such admissions, and in such a case the Court will find that adultery is proved as against the wife, but is not proved as against the co-respondent. Now nothing of that kind, as it appears to me, occurred in this case. There was one simple issue, that on an occasion, as it

is said in the petition, at the end of August or the beginning of September, the husband did commit adultery with Miss Richardson, and the proof alleged was that he had gone into her bedroom and had had intercourse with her there. The intervener, Miss Richardson, appeared at the trial, and upon that issue as to whether the husband had committed adultery with her, she gave evidence to the effect that he had come into her room; that he had made overtures to her, but that she had resisted them, and in addition to that, she produced medical evidence to the effect that intercourse had not taken place. Upon that evidence we, in this Court, on appeal from the learned judge, came to the conclusion that the petitioner had not established against her husband the case of adultery with Miss Richardson; in other words, that the allegation in para. 6 of the petition was not proved.

The question now is what order ought to be made under those circumstances. It appears to me that there is no question here of evidence being admissible against the husband and not admissible against the intervener. There was some evidence given which no doubt was material and which was evidence against the husband. It was evidence to the effect that he had admitted that he had been in her room, and, as put by one witness, that he had been in her bed. When the doctor was called, he said first of all that the husband admitted that he had been in her bed, and when asked to repeat that statement to make it clear, he then confined the admission to an admission that he had been in her bedroom, which was in common with the case of the intervener. But both the wife and the doctor said that he had in fact denied that the intercourse had taken place. It is perfectly true that if that evidence had stood alone, and if the intervener and the doctor who examined her had not been called, that evidence would have been strong to indicate that adultery had taken place. But it is impossible to abstract one's mind from the real evidence in the case. The evidence of the intervener was evidence upon the issue, and evidence which the learned judge was bound to take into account in determining the one issue that was raised before him—

C. A. 1922

RUTHERFORD v. RUTHERFORD

Atkin L.J.

namely, whether the allegation in the petition was proved. In our view, it was not proved. I am not quite sure, but I think I went a little further than the other members of the Court in expressing my view that it was disproved; but the same result follows. The issue was not proved, and therefore the result emerges that in this case the petitioner has sought to obtain a dissolution of marriage by alleging that her husband had committed adultery with a young woman with whom we do not think he had committed adultery.

To my mind it follows logically that the result is that the petition must be dismissed, and I think that any other result would really be revolting to common-sense. It would be a great misfortune if this Court should be put in the position of it even being suggested that such an absurd result could be arrived at as is sought to be contended for in this case.

Now, the only other question that arose or might have arisen was this. The appeal was an appeal by the intervener, and the notice of appeal asked that the decree should be set aside. The respondent, the husband, gave no notice of appeal, and the notice of appeal, so far as I can see, was not served upon him. The question therefore arises as to our powers, under those circumstances; but it appears to me that our powers are ample to make the proper order.

At the present moment, subject to anything that may have been decided, it seems to me that Order LXVIII., r. 1, which says that "Subject to the provisions of this Order nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters . . . . (*d*) Proceedings for Divorce or other Matrimonial Causes," has no reference to proceedings in the Court of Appeal. By Order LVIII., r. 4, the powers of the Court of Appeal are powers "to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part

only of the decision may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may be just."

Under those circumstances, it appears to me that the right order for this Court to make is the order that the Court below ought to have made if it had taken the same view of the facts as this Court took at the hearing of the appeal, and the result, as it appears to me, is that as we have already dismissed the intervener with costs here and below, the proper order to make is that the petition be dismissed.

On the application of *Bayford K.C.* a decree for judicial separation on the ground of cruelty was made and the order giving the petitioner the custody of the children was directed to stand.

Solicitors: *The King's Proctor; Withers, Bensons, Currie, Williams & Co.*

W. I. C.

1921
Dec. 16, 17, 19, 20.
1922
Feb. 15.

ADMIRALTY.

THE HERMIONE.

Shipping—Authority of Ship's Agents—Settlement of Action contrary to express Prohibition of Principal—Breach of Duty—Damages—Naval Agency and Distribution Act, 1864 (27 *&* 28 *Vict. c.* 24), *s.* 12.

The authority of duly appointed ship's agents under the Naval Agency and Distribution Act, 1864, is not wider than that of a solicitor; and if ship's agents settle an action contrary to the express prohibition of their principal they are guilty of a breach of duty and liable in damages for the consequences, even if the settlement be made without negligence and on the advice of counsel and in the bona fide belief that it is in the principal's interests.

ACTION against ship's agents for negligence and/or breach of duty.

The plaintiff was Commander Cyril J. L. Noakes, R.N., on behalf of himself and other officers and members of the crew of H.M.S. *Daffodil*. The defendants were Stilwell & Sons, the duly appointed ship's agents for the *Daffodil* under the Naval Agency and Distribution Act, 1864.

The plaintiff's case was that the defendants and/or their solicitor and agent, Mr. Arthur Tyler, without communicating to the plaintiff an offer of settlement, negligently and in breach of their duty, and contrary to the express instructions of the plaintiff, accepted the sum of 100*l.* and 10*l.* 10*s.* costs in settlement of the plaintiff's claim in a salvage action brought in respect of services rendered to the steamship *Hermione* and her cargo.

The defendants pleaded that in settling the action they acted under the advice of counsel (1), who advised that the plaintiff had no chance of success against the owners of the *Hermione* and had no prospects of success under the circumstances of the case against the owners of the cargo. The defendants alleged that the sum of 100*l.* was a fair and reasonable remuneration for such services, if any, as were rendered by the plaintiff and the officers and crew of the

(1) The barrister referred to was not one of the counsel in the present proceedings.

Daffodil. They denied that they accepted the offer of 100*l.* without communicating the offer to the plaintiff, or that they accepted it contrary to his express instructions, and they denied that they were negligent or guilty of any breach of duty.

The facts are fully set out in the judgment.

C. R. Dunlop K.C. and *Langton* for the plaintiffs. The defendants took no steps to ascertain what cargo had been landed or its value; and after an appearance had been entered on behalf of the owners of the ship, cargo and freight they took no steps to proceed with the action. By a settlement which they had no authority to make the defendants deprived the plaintiff of his right of action. Under s. 12 of the Naval Agency and Distribution Act, 1864, the defendants, as ship's agents, owed an absolute duty to "take or cause to be taken all steps and proceedings . . . . necessary and proper . . . ." on behalf of the ship and the officers and crew. It is not sufficient for the ship's agent to allege that he employed competent agents. The defendants' duty at common law was to obey the principal's instructions. They were instructed to recover on the plaintiff's behalf such an amount of salvage as he was legally entitled to—i.e., an award of the Court—and the defence must fail unless they establish that the Court would only have awarded 100*l.* The defendants had no authority to settle the action without specific instructions to do so. The authority of a ship's agent is not the same as that of a solicitor, and ship's agents have no general authority to compromise an action.

[HILL J. I shall want authority for that proposition.]

Certainly the defendants had no authority to settle in the present case before all reasonable steps had been taken. They cannot shelter themselves behind the opinion of counsel, which was based on the erroneous assumption that the only proceedings available were in rem. As competent solicitors, Messrs. Tyler would know that they were entitled to proceed with the action and obtain judgment in personam against the owners of the salved property. A solicitor "cannot

1921

THE HERMIONE.

shift from himself such responsibility by consulting another where the law would presume him to have the knowledge himself " : per Tindal C.J. in *Godefroy* v. *Dalton*. (1)

Bateson K.C. and *Wilfred Lewis* for the defendants. The plaintiff's salvage claim at best was a very poor one, the services were slight and the value of the property actually salved was very small. That property, too, as " wreck," ought to have been handed over to the receiver of wreck under s. 518 of the Merchant Shipping Act, 1894, under penalty of a fine and of forfeiture of any claim for salvage. Further, there was a serious charge of negligence brought against the salvors, which might well have been established. Taking all the circumstances into consideration the settlement for 100*l.* was one very favourable to the plaintiffs. Navy agents, like solicitors, have a general authority to settle actions : see, as to solicitors, *Little* v. *Spreadbury* (2) ; *In re Newen* (3) ; and the onus is on the plaintiff to prove that he gave express instructions to the defendants not to settle the action.

Cur. adv. vult.

1922. Feb. 15. HILL J. read the following judgment : In this action the plaintiff, as former commander of H.M.S. *Daffodil*, suing on behalf of himself and those who were her officers and crew on April 14 and 15, 1917, claims damages against the defendants alleging that the defendants, by themselves and their agent, Mr. Arthur Tyler, solicitor, were negligent in the prosecution of a salvage claim ; and further, that they compromised that claim for the sum of 100*l.* and 10*l.* 10*s.* costs, contrary to the express prohibition of the plaintiff.

The defendants were appointed by the plaintiff to be ship's agents under the Naval Agency and Distribution Act, 1864. Mr. Tyler died on April 30, 1919, in the course of the proceedings, and was succeeded by the firm of Arthur Tyler & Co. Mr. Arthur Tyler was instructed by the defendants

(1) (1830) 6 Bing. 460, 469. (2) [1910] 2 K. B. 658.
(3) [1903] 1 Ch. 812.

in the salvage proceedings, which were instituted on the plaintiff's instructions, and appeared on the writ as solicitor for the plaintiffs in those proceedings, who were described as the commander, officers and crew of H.M.S. *Daffodil*. It is admitted in the pleadings in the present case that Mr. Tyler acted as agent for the defendants. But for that admission, I should have been of the opinion that he was not an agent of the defendants but only of those persons whose solicitor he was, appointed by the defendants in their capacity as ship's agents, but acting not for the defendants but for the plaintiff upon the record. In view of the admission, I deal with the case on the basis that Mr. Tyler was the agent of the defendants, but, on the facts as I find them, this point is not of importance in the present case. There is no action brought against Messrs. Tyler & Co.

There are two distinct breaches of duty alleged: (1.) Negligence in the prosecution of the salvage action; (2.) Settling it contrary to an express prohibition. I have come to the conclusion that there was no negligence on the part of either the defendants or Mr. Tyler or his successors in the prosecution of the salvage action. As to the charge of settling it contrary to an express prohibition, there is no doubt at all that Messrs. Tyler & Co. had the authority of the defendants to settle as they did. The only question left is whether the defendants gave that authority contrary to the express prohibition of the plaintiff. I base my finding that Messrs. Tyler & Co. had the defendants' authority to settle upon the correspondence, which shows a previous authority and a ratification.

As regards the defendants I have, with some hesitation, come to the conclusion that they authorized the settlement contrary to an express prohibition, and that, while in the absence of such a prohibition, they could not, in all the circumstances of the case, have been held negligent to settle as they did, yet they were guilty of a breach of duty in settling contrary to an express prohibition and are liable in damages for the consequences. Their duty under the Naval Agency and Distribution Act, and apart from the Act as the

1922

THE HERMIONE.

Hill J.

plaintiff's agents, was to do all things necessary or proper in the course of the salvage claim. That, in my view, included an authority to settle a salvage claim, provided it was done reasonably, but the authority to settle in a ship's agent is not wider than that of a solicitor, and does not extend to a settlement on terms forbidden by the principal.

The main facts of the case are as follows: On April 14, 1917, the steamship *Hermione*, homeward bound with a cargo of wheat, frozen meat, and other goods, was mined in the neighbourhood of the Coningbeg Light vessel. Her crew took to the boats. The *Daffodil*, a sloop of 868 tons, with a complement of 91, was on duty near by and went to the assistance of the *Hermione*. The *Hermione* was badly holed. No. 1 hold was full of water: No. 2 had 8 feet of water; there was also a crack in the upper part amidships; the windlass was disabled; and she was badly by the head. An officer, engineer and men from the *Daffodil* boarded her, as did the master and boatswain of the *Hermione*. The pumps were got to work and prevented the water from increasing. The *Daffodil* took the *Hermione* in tow, and brought her to an anchorage in Dunmore Bay. The *Hermione's* own crew returned, and the *Daffodil* left for duty outside. An armed trawler remained alongside. The intention of the plaintiff was to return and take the *Hermione* further in on the following morning and beach her. About 10.30 P.M. the bulkhead between Nos. 1 and 2 holds was heard cracking, and the water in No. 2 rapidly increased, with the result that the *Hermione* sank forward, and the engine and stokehold were flooded. On the following morning the *Daffodil* returned, and her men spent the day in breaking out a quantity of rubber and ipecacuanha, which formed part of the cargo. This the *Daffodil* landed. A number of horses on board were landed by the steamship *Arklow*. The ship and the rest of the cargo were subsequently taken in charge by the Salvage Association acting for the underwriters. The bulk of the cargo, including all the frozen meat and most of the wheat, was worthless; but other parts of the cargo were landed and forwarded to destination. The value of the salved portion

1922

THE HERMIONE.

Hill J.

was considerable. The ship became a constructive total loss, but a few movables were saved. Expenses were incurred by the Waterford Harbour Commissioners in breaking up the wreck, and apparently these were in part recouped out of the value of the cargo salved, I presume under powers of the Waterford Harbour Commissioners to treat ship and cargo as a common fund for recouping expenses.

What the *Daffodil* succeeded in doing was to bring the *Hermione* from a place where she would have sunk in deep water to a place where she sank in shallow water, so that part of her cargo could be salved. Her crew further broke out and landed the rubber and ipecacuanha. That is the only part of the cargo of which they completed the salvage. The services were short, the towage seven hours, the distance was twenty-five miles, the weather was fine. The *Daffodil* was exposed to some extra risk from mines and possibly submarines while towing. She had three armed trawlers acting as escort. As between the *Daffodil* and the *Hermione*, each accuses the other of negligence. The *Daffodil* says that the *Hermione* was negligently allowed to sink at anchor in Dunmore Bay. The *Hermione* says the *Daffodil* ought to have taken assistance of a pilot which was offered, and ought to have beached the *Hermione* at once. Now that the case has been tried out, and the facts investigated, I am unable to find that these charges of negligence are made out. No. 2 hold was full of wheat. The bulkhead between Nos. 1 and 2 must have been damaged by the explosion, for water was flowing into No. 2. I am advised that the wet wheat in No. 2 would swell rapidly and be likely to cause the damaged bulkhead to give way. I accept the evidence of the master of the *Hermione* that there was a sudden increase of water which no pumps could have controlled. It was said that the master ought to have used the trawler alongside to beach the ship, but it is very doubtful whether there was time to do anything effective. I cannot find that the sinking was due to the negligence which is charged against the master and crew of the *Hermione*. On the other hand, the master was satisfied to have the *Hermione* brought to anchor where

1922

THE HERMIONE.

Hill J.

she was, and the plaintiff, who did not know that the cargo in No. 2 was wheat, was not negligent in bringing the ship to an anchor instead of immediately beaching her; and, except to assist in beaching, the help of a pilot was not required. There was no negligence of the plaintiff or his men. The sinking was a misfortune, both for the owners and underwriters and for the plaintiff and his officers and crew. Had the service been completed up to the point of beaching, it would have been valuable as regards the cargo; whether the *Hermione*, which was twenty-eight years old, would in any event have escaped becoming a constructive total loss, is more doubtful; but much more of the cargo would have been saved. The sinking turned the service into one of very moderate success, whereby a comparatively small part of the whole cargo was brought into greater comparative safety, and of that again a small part was actually brought into final safety by being landed by the *Daffodil* at Waterford. Even of what was actually saved, the commander, officers and crew of a King's ship could look for no reward as to part, for the wheat was the property of the Crown, and in respect of it no action would lie in this Court and no claim would be recognized by the Crown for services rendered by servants of the Crown.

Such, on the facts as now ascertained, was the service in respect of which the plaintiff was anxious to prosecute a claim. It was a good claim for what it was worth. In my opinion the suggestion that it had been lost by the failure of the plaintiff to hand over the rubber and ipecacuanha to the receiver of wreck, is without foundation. The receiver of wreck in his letter makes no complaint, and I can see no ground for saying that when there are people representing the owners on the spot, as there were, shipowners' agents at Waterford, the salvor forfeits his claim, because he does not hand over the property salved to the receiver of wreck. On the other hand it was not a certain claim, for it was always open to the suggestion, which in fact was made by Messrs. Crump & Son for the underwriters and owners as early as July 25, 1917, that the plaintiff had

improperly failed to beach the ship at once, a suggestion which we now know to be unsound, but which had to be considered by any one who was advising the plaintiff.

I now come to the prosecution of the claim. A good deal of complaint was made as to delay in issuing a writ, failure to arrest and obtain bail and have values proved and so forth. I need not investigate this closely. I do not find that there was any just cause of complaint in these respects. By the time the plaintiff gave adequate instructions, all or nearly all the salved cargo of any substantial value had been landed and forwarded to destination. But I do not think it is necessary to consider that matter further, because I am clearly of opinion that no damage resulted from any such delay, if delay there was. A writ was issued; an undertaking to appear was given on March 6, 1918; appearance was entered by Messrs. Crump & Son on the instructions of the Salvage Association, which represented both the owners of the *Hermione* and the cargo interests other than the Government. The plaintiff was therefore put in a position to proceed in personam and to obtain discovery, and the values would have been ascertained, and a judgment in personam would have resulted in payment of the award and costs. Mr. Tyler twice took the opinion of counsel. The plaintiff does not complain of the particular counsel chosen. He frequently appeared for commanders, officers and crews of King's ships. The first instructions consisted of the writ, which bore upon it the indorsement of undertaking to appear, a statement of the services with the log and chart, a bundle containing the Admiralty consent and the reports by the plaintiff and correspondence. They were put before counsel. The first opinion, given on April 13, 1918, treated the case against the ship as hopeless, because she had become a total loss, and as to the cargo, assumed that only certain small values had been saved. Upon this opinion being submitted to the plaintiff, he wrote a long letter on June 10, 1918, giving his views of the facts and referring to portions of the cargo salved as of the value of at least 10,000*l*. This letter, with the other papers, was put before counsel, who

1922

THE HERMIONE.

Hill J.

gave a second opinion dated June 24, 1918. He advised that there was no chance of success in respect of the ship, and that as to the salved cargo, apart from the difficulties of appraisement of a dispersed cargo, the plaintiff had lost his claim by not taking the necessary steps at the time of the salvage, by informing the receiver of wreck and obtaining a bond before the cargo was dispersed. Counsel, in coming to this opinion, was apparently misled by a prize salvage case, *The Otway* (1), and an Admiralty war order relating thereto. *The Otway* had no bearing at all, so far as I can see, upon a case in which a claim in personam had been made effective by the appearance of the owners of the property alleged to have been salved.

In view of these opinions of counsel, I am of opinion that Mr. Tyler and the defendants were justified in thinking that it was to the plaintiff's interest that the action should be settled upon any terms that could be obtained; and if, in the unfettered exercise of their authority as solicitor and as ship's agents respectively, they had settled for 100*l.* and payment of 10*l.* 10*s.* costs, I do not think it could be said that they had acted negligently. It is said that they ought to have done more to ascertain the value of the cargo saved; but if the opinion of counsel was sound, it made no difference whether the cargo was worth more or less, and money spent in continuing the action until values were ascertained would only have been money thrown away. The settlement was not made until November, 1919, when it was obvious that Messrs. Crump would make no better offer.

Now comes the question whether the settlement was not made contrary to the express prohibition of the plaintiff. The answer depends on some half-dozen letters and upon the absence of a reply by the plaintiff to a letter of September 4, 1918. In his long letter of June 10, 1918, the plaintiff had said: "I still wish to prefer my full claim . . . . and I request that you will not interpret the foregoing as any relinquishment of our claim," and then he went on: "I think these small values amount to a very considerable sum: I should

(1) Unreported.

1922

THE HERMIONE.

Hill J.

say at least 10,000*l.* without taking the wreck into consideration. I should be very much obliged if you would carefully consider these remarks, and it is for you to say if there is any prospect of success in the High Court." Later on he expressed the hope "that you will be able to get some offer from the people who, without doubt, have made considerable gain out of the risks and labours of the *Daffodil's* crew. Without prejudice as to any further action we may take, we are of course entirely in your hands as to the legal position." There were delays in the correspondence, because by this time the plaintiff was serving in the Eastern Mediterranean. On May 28 the defendants wrote to the plaintiff: "Our solicitors inform us to-day that the defendants' solicitors have made a suggestion that if you are prepared to accept 100*l.* they will advise their clients to agree to this proposal. Would you kindly let us know whether this would be agreeable to yourself and the crew of H.M.S. *Daffodil*." On July 5 the plaintiff replied: "I do not think I should be justified in accepting the offer of 100*l.* In order to avoid a lot of expensive litigation, I would accept an offer of 10,000*l.* . . . . I cannot agree with counsel's opinion. . . . . If you have no objection, I propose on my return to England to obtain independent advice, unless something better can be done with reference to this claim." On July 26 Messrs. Stilwell wrote acknowledging receipt of the letter of the 5th and saying: "With reference to your estimate of the value of your claim for salvage, we regret that this is far in excess of the amount that the High Court or any arbitrator now awards, and venture to suggest that when you return to England you should call on our solicitors. . . . . Of course if you prefer to take an independent opinion, you are quite at liberty to do so." On August 14 Commander Noakes wrote: "I definitely withdraw my offer on behalf of the ship's company of H.M.S. *Daffodil* to accept 10,000*l.*"; and then: "I request that you will be good enough to inform me the exact position in which this claim now stands: (*a*) If you are in complete agreement with your counsel's opinion or not? (*b*) What further steps, if any, you propose to

1922

THE HERMIONE.

Hill J.

take? (*c*) If I have been informed of all the steps already taken? (*d*) If you recommend me to accept the 100*l.* offered by the owners?" Then he ends: "I will at once inform you on my return to England, which I expect will be shortly, so that this claim may be proceeded with." On September 4 Messrs. Stilwell wrote to him in reply to that: "(1.) We agree with our counsel's opinion; (2.) The only step that we can suggest is to try to screw the owners to a more liberal offer; (3.) We have informed you of all the steps so far taken; (4.) Failing any increased offer the 100*l.* had better be accepted."

Now that letter was received by the plaintiff in the Mediterranean towards the end of September; he sent no reply, and it was in that state of their instructions that the defendants authorized Messrs. Tyler to settle, and they did settle, giving up most of their own claim for costs, getting 10*l.* 10*s.* for costs from the other side and the 100*l.* which had originally been offered. The result was that the plaintiff got 100*l.* and no costs at all chargeable to him, because Messrs. Tyler gave up the difference between their own costs, which were said to have amounted in out-of-pockets to 60*l.*, and the 10*l.* 10*s.* Messrs. Tyler accepted the 10*l.* 10*s.* in satisfaction of their costs. On November 19 Messrs. Stilwell wrote to Commander Noakes reporting the settlement. Again he sent no reply, but he came to England early in the following year, and the next letter from him was a letter from his present solicitors complaining of the settlement.

Taking all these letters up to September 4, 1919, coupled with the fact that the plaintiff sent no reply, can it be said that the plaintiff authorized the defendants, or by his conduct induced the defendants, to believe that he had given them authority to settle or to make a settlement of the kind which was made? I think not. He had refused to accept 100*l.*, and proposed on his return to England to obtain independent advice, "unless something better can be done with reference to this claim." He had later on withdrawn his own absurd figure of 10,000*l.*, and asked whether the defendants recommended him to accept 100*l.* He did not assent to the accepting

of 100*l.*, and in that letter said he expected to be in England shortly, so that the claim might be proceeded with. The defendants expressed in reply their opinion as to the wisdom of accepting the 100*l.*, but without receiving a reply, although the time for reply in the ordinary course had gone by, authorized a settlement. I cannot find in those matters, first of all, that the plaintiff authorized the settlement. It is to my mind quite clear he did not. Did he by his silence induce the defendants to believe that he had authorized it? Again, in face of the specific prohibition in the letters, I cannot find that by not replying to the last letter he led the defendants to suppose that they had authority. On this matter I may also add that it was not the want of a reply to their last letter which induced the defendants to do anything, because they had begun the final settlement before any reply could have been received. I think, though, as I say, I came to the decision with some hesitation, I must find that the defendants settled in breach of their duty towards the plaintiff. It was said with truth that the defendants were agents, not only of Commander Noakes, but of his officers and crew, and they were also entitled to have some regard to the fact that Commander Noakes was apparently a person who sometimes expressed very rash opinions, because in one of his letters he stated he did not mind if the whole of the award recovered was used up in costs, he still wanted to fight. It is also quite true that as agents for the officers and crew, the defendants had their interests to consider, but that gave them no authority to settle Commander Noakes's claim against his prohibition; and their only alternative, if they thought he was a wholly unreasonable man, would seem to me to be to communicate with him and the other people for whom they were acting and tell them that they must cease to act as their agents. Therefore I can see no way by which I can acquit the defendants of a breach of duty.

I now have to consider what are the damages. This again is a difficult point. The damages are the difference between the 100*l.* received and the sum which would have been recovered, less perhaps the difference between solicitor and

1922

THE HERMIONE.

Hill J.

client and party and party costs which the plaintiffs might have had to bear had the salvage action been continued; and of course that might have been not a wholly negligible amount if the issue of negligence had been raised in the salvage action and had been fought out. The amount which would have been recovered, on the facts as we now know them, would not have been large in my judgment, but it would have been substantially more than 100*l.* It is not possible now to ascertain with exact precision the values of the property salved. [His Lordship dealt with the various portions of the cargo and their values so far as ascertainable, and continued:] Adding up all these figures, it will be found that what was saved comes to something over 35,000*l.*; it is substantially under 40,000*l.* No doubt there would have to be very considerable deductions made from that. No claim has been made in respect of freight; it may be none was saved; very likely it is not claimed because the expenses of forwarding the small parcels of cargo that were saved would eat up any freight there was upon them. I ignore the expenses on the one side and the freight on the other, and take it that the plaintiffs completed the salvage of property worth 8500*l.*; that is the rubber and ipecacuanha. In taking the whole property brought into greater comparative safety as being worth something under 40,000*l.*, I think I am being generous to the plaintiff.

What, in such circumstances, would the Court have awarded the commander, officers and crew of a King's ship, remembering that nothing had to be awarded to the *Daffodil* as the instrument of salvage; that only a personal award had to be made for the personal risk and exertions of the commander, officers and crew; and that in a case in which by the misfortune of the salvors, and of everybody, the service had turned out to be one which saved only a small portion of the property at risk? The amount would necessarily have been a very moderate amount. At the outside I think, if I had been trying the case, I should not have given more than something between 500*l.* and 600*l.* Something would have had to come off that for costs incurred by the plaintiff which would

1922

THE HERMIONE.

Hill J.

not have been recovered; and if (and I do not see why it should not) the issue of negligence had been fought, that might well have run into 50*l.* I think I shall be dealing with the plaintiffs quite fairly if I say that, if the case had been continued and had been fought out, the net result would have been to give the plaintiffs 500*l.* instead of 100*l.* The damages therefore are 400*l.*, and for that amount I give judgment with costs.

Solicitors for the plaintiff: *Parker, Garrett & Co.*
Solicitors for the defendants: *Woolley, Tyler & Bury.*

E. C. M. T.

ADMIRALTY.

1922

Feb. 9, 16.

THE HARLOW.

Shipping—Limitation of Liability—Tug and Tows in same Ownership—Limitation on Tonnage of Dumb Barges as "ships"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 2, 503, 742—*Merchant Shipping (Liability of Shipowners) Act*, 1898 (61 & 62 *Vict. c.* 14), *s.* 1—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 85, *Sch. II.*

The plaintiffs' tug with five dumb barges in tow came into collision with the defendants' steamship and damaged her. The negligent navigation causing the damage was that of the plaintiffs' servants on the tug and on the barges, all of which were British built. The tug and all the barges belonged to the plaintiffs. The steamship was struck by the tug and one of the barges, but another barge, fast to the colliding barge, by her weight and momentum contributed to the damage. The plaintiffs sought to limit their liability, in accordance with the provisions of the Merchant Shipping Act, 1894, to an amount based on the tonnage of the tug, or alternatively on the tonnage of the tug and the colliding barge. The shipowners contended that the plaintiffs could not limit their liability on the tonnage of any of the barges on the ground that they were not "ships," or that if "ships" they were not registered.

Sect. 503 of the Merchant Shipping Act, 1894, permits limitation of liability in the circumstances set out in the section to "the owners of a ship, British or foreign"; and s. 742 defines a ship as including "every description of vessel used in navigation not propelled by oars." By s. 508 "nothing in this part of the Act [Part VIII., Liability of Shipowners] shall . . . . extend to any British ship which is not recognised as a British ship within the meaning of this Act"; and by s. 2: "Every British ship shall, unless exempted from registry, be registered" under

1922

THE HARLOW.

the Act, and a ship required to be registered which is not registered "shall not be recognised as a British ship." By the combined effect of s. 1 of the Merchant Shipping (Liability of Shipowners) Act, 1898, and s. 85, Sch. II., of the Merchant Shipping Act, 1906, the limitation sections of the Merchant Shipping Act, 1894, apply "to the owners, builders, or other parties interested in any ship" built in the King's Dominions, "from and including the launching of such ship until the registration thereof under s. 2 of the Merchant Shipping Act, 1894":—

Held (*a*) that the barges, which were fitted with rudders and were not propelled by oars, were "ships" within the meaning of ss. 503 and 742; (*b*) that by virtue of the provisions of s. 1 of the Act of 1898 and s. 85, Sch. II., of the Act of 1906, the barges did not require registration; and (*c*) that the plaintiffs were entitled to a decree of limitation on the combined tonnage of the tug and the two barges.

The Ran; *The Graygarth* (ante, p. 80) considered and explained.

ACTION of limitation of liability.

The plaintiffs were Cory Lighterage, Ld., the owners of the steamtug *Harlow* and of the dumb barges *Silver*, *Fifteen*, *Sixteen*, *Agenor* and *Sokoto*. The defendants were the owners of the steamship *Dalton* and others.

The following statement of the facts is taken from the judgment of the learned President:—

"At 2.30 A.M. on January 2, 1921, the steamship *Dalton*, outward bound, was proceeding down the Thames, when the steamtug *Harlow* which was bound up river with five coal-laden barges in tow in three ranks—two, two and one—finding herself and her tow on the wrong side of mid-channel, made to cross the course of the *Dalton*, came into collision with her, and brought into collision one or more of the *Harlow's* barges. There was damage to the *Harlow*, attended by loss of life. The *Dalton* sustained damage by collision with a barge or barges.

"In an action in rem in respect of the collision in which there were cross-claims, the owners respectively of the vessels concerned claimed damages. The owners of the *Harlow* were owners also of the lighters. The crew of the tug and the various lightermen were their servants. Judgment was given in favour of the owners of the *Dalton* against the owners of the *Harlow*. The *Harlow* was held to blame for the collision and the *Dalton* free from blame. There was also a finding that the lightermen of the five

1922

THE HARLOW.

barges were guilty of improper navigation, which was expressed in these words: 'If the lightermen had been, as they ought to have been, on board their lighters, the lighters could have been cast off, and ought to have been cast off, in such a time as would, if it did not avoid the collision between the barge and the *Dalton*, at any rate have greatly lessened the damage done to the *Dalton*.' There was therefore a finding which established that the defendants, owners of the *Harlow* and the barges, were by their servants on all these vessels guilty of improper navigation, and that the plaintiffs suffered damage.

"The owners of the *Harlow* and of the barges she had in tow are plaintiffs in the present action which is brought for the purpose of limiting their liability in respect of damages by the collision in accordance with s. 503 of the Merchant Shipping Act, 1894. Their statement of claim as originally framed claimed a decree of limitation to an amount to be measured by the tonnage of the *Harlow*. The owners of the *Dalton* by their defence resisted this claim on the ground that the damage to the *Dalton* was caused not by the *Harlow* alone but by the joint action of the *Harlow* and her tow. After the pleadings had been closed judgment was given in the Court of Appeal in *The Ran* and *The Graygarth* (1), an action which raised questions as to the incidence of damage in the Admiralty jurisdiction where a vessel is brought into collision by improper navigation directed or controlled by persons outside such vessel. For the purpose of raising a contention sought to be founded upon this judgment, the plaintiffs amended their statement of claim by alleging that the damage to the *Dalton* was caused by collision with her of one among the *Harlow's* tow of barges, the barge *Silver*. They claimed alternatively to limit their liability by the tonnage of the *Silver* alone, or of the *Harlow* alone, or of the *Harlow* with the *Silver*.

"After the amendments of the pleadings as between the original parties an appearance was entered for other defendants, the owners of the steamship *Taormina*. They allege

(1) Ante, p. 80.

1922

THE HARLOW.

that by reason of the same acts of improper navigation of the plaintiffs' servants which caused damage to the *Dalton*, the *Harlow* came into collision with the *Taormina*, and they dispute the right of the plaintiffs to limit their liability as claimed in the statement of claim or at all."

Bateson K.C. and *Alfred T. Bucknill* for the plaintiffs. The contact between the tug and the *Dalton* did no damage, and as the tug and the barges are in the same ownership the plaintiffs are entitled to a decree of limitation of liability based on the tonnage of the colliding barge alone. That, it is submitted, is the result of the recent decision in *The Ran.* (1) But for that decision, as both the tug and one of the barges were negligent, the plaintiffs would be entitled to a decree of limitation based on the tonnage of the tug and of the colliding barge: *The Englishman* (2); *The Morgengry.* (3) The plaintiffs cannot be liable for a limited amount based on the tonnage of the tug and all the barges, including those not in collision, as contended by the defendants. The defendants' other contention that the plaintiffs are not entitled to limit their liability at all so far as the barges are concerned is apparently based on the definition of a "ship" in s. 742 of the Merchant Shipping Act, 1894. These barges, however, were "ships," they were "vessels used in navigation not propelled by oars": cf. *The Mudlark* (4) following *The Mac.* (5) If it be contended that they were ships but not registered ships, owing to the provisions of s. 1 of the Merchant Shipping Act, 1898, as amended by s. 85, Sch. II., of the Merchant Shipping Act, 1906, it is no longer necessary for British ships to be registered under s. 2 of the Merchant Shipping Act, 1894.

[*The Warkworth* (6) was also referred to.]

C. R. Dunlop K.C. and *E. Aylmer Digby* for the defendants, the owners of the *Dalton*. If the plaintiffs can limit at all on the tonnage of the barges, which is disputed, they can

(1) Ante, p. 80.
(2) [1894] P. 239.
(3) [1900] P. 1.
(4) [1911] P. 116.
(5) (1882) 7 P. D. 126.
(6) (1884) 9 P. D. 145.

1922

THE HARLOW.

only limit on the combined tonnage of all of them. The tug and craft must be regarded as a floating mass in motion; the damage was obviously increased by the weight and momentum of all the craft which were made fast together. The onus is on the plaintiffs to show that the damage would not have been lessened if the barges had been cast off, as the Court found they ought to have been. *The Ran* (1) does not decide that where there is negligence on both tug and tow, and both are in the same ownership, the injured parties cannot make the tug owners limit their liability on the tug as well as on the tow. The decision merely was that there being no judgment in rem against the wrongdoing owners as owners of the tug, they were not entitled in that action to limit their liability on the tonnage of the tug. Lord Sterndale said in terms that "as owners of the *Graygarth* (the tug) they might be liable also, but in the action in which they were sued as owners of the *Ran* (the barge) they could only be responsible if the *Ran* was improperly navigated." It was unnecessary, however, in that action for the claimants to ask for a decree of limitation based on the tonnage of the tug as well as on the tow, as the amount based on the tonnage of the tow was sufficient to satisfy the claims. But in this case the plaintiffs cannot limit their liability on the tonnage of the barges at all. Until 1898 an unregistered British ship could not obtain a decree of limitation, and s. 1 of the Merchant Shipping Act, 1898, is confined to newly launched ships. The amending Act of 1906, which abolished the three months' limit of time for registering British ships, was not intended to, and does not, entirely abrogate s. 2 of the Merchant Shipping Act, 1894. It merely grants an extension of time for such period as may be required to complete the vessel and take the necessary steps to register her. The contention that dumb barges or lighters could not limit their liability is borne out by s. 1 of the Merchant Shipping Act, 1921, which expressly extends the rights of limitation to "every description of lighter, barge or like vessel used in navigation in Great Britain, however propelled," and also provides for their

(1) Ante, p. 80.

1922

THE HARLOW.

registration. The plaintiffs cannot avail themselves of this Act, which only came into force on January 1, 1922.

Langton for the defendants, the owners of the *Taormina*. The question has not yet been determined whether the collision between the *Harlow* and the *Taormina* was a consequence of the first collision, in which event the owners of the *Taormina* would, it is submitted, have a right to claim against the limitation fund produced by the limited amount based on the tonnage of the tug and the barges (if the barges be allowed to limit). These defendants, therefore, are clearly interested in the composition of the limitation fund in the present proceedings. They adopt the argument of the first defendants and contend further that the barges were not "ships" within the meaning of ss. 503 and 742 of the Merchant Shipping Act, 1894; the decision in *The Mac* (1) that dumb barges are "ships" was obiter, it was sufficient for an award of salvage to be made for the Court to find that they were "boats." The Legislature manifestly must have been of opinion that dumb barges or lighters were not ships, otherwise the provision of s. 1 of the Merchant Shipping Act, 1921, would have been unnecessary.

[*Gapp* v. *Bond* (2) and *The Blow Boat* (3) were also referred to.]

Bateson K.C. replied.

Cur. adv. vult.

Feb. 16. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: [After setting out the facts his Lordship continued:] Whether, or to what extent if at all, the plaintiffs are entitled to limit their liability in the circumstances of the case is a matter on which the owners of the *Dalton* and the owners of the *Taormina* to some extent made common cause in argument, though in the event of a decree of limitation based upon the tonnage of the *Silver* alone or of the *Harlow* alone their interests might hereafter be found in conflict.

(1) 7 P. D. 126. (2) (1887) 19 Q. B. D. 200.
(3) [1912] P. 217, 220.

1922

THE HARLOW.

The President.

It is convenient to deal in the first place with a contention which was argued on different grounds by counsel for the respective defendants and which was to the effect that in respect of the five barges and each of them the Merchant Shipping Act, 1894, gives no right to the plaintiffs to limit their liability. Both arguments depended upon the true effect of s. 508 of the Merchant Shipping Act, 1894, and certain amending Acts. By s. 508 it is enacted that the provisions of the statute in relation to limitation of liability "shall not extend to any British ship which is not 'recognised as a British ship'" within the meaning of that Act. For the owners of the *Taormina* it was contended that upon the true construction of the statute neither of the lighters in question is a ship within the meaning of ss. 503 and 742 of the Merchant Shipping Act, 1894. "Ship" is defined in s. 742 as including "every description of vessel used in navigation not propelled by oars." These barges were admittedly not propelled by oars. Each was a vessel used for navigation in the transport of goods on the Thames, in tow of tugs and upon the tides, fitted with a rudder and managed by her own crew. The judgments of the Court of Appeal in *The Mac* (1) were cited, and for the owners of the *Taormina* it was urged that the decision in that case is not decisive of the question now under consideration. It is true that some of the matter debated in *The Mac* (1) arose on the construction of the words "ship or boat" in a section of the Merchant Shipping Act, 1852, and that the Court had to decide whether a mud hopper—like in construction and mode of navigation to the barges here in question—was a "ship or boat." Each member of the Court, however, considered whether she was a "ship" and held that she was. Upon the reasoning which Lord Esher applied in *The Mac* (1), as reported at length in Aspinall's Reports, I ought in my opinion to hold that each of the barges here in question is a "ship" within the definition contained in the Merchant Shipping Act, 1894, s. 742. *Gapp* v. *Bond* (2), which was relied on in some measure by Mr. Langton for the owners of the *Taormina*, was a case under the Bills of

(1) 7 P. D. 126; 4 Asp. M. L. C. 555. (2) 19 Q. B. D. 200.

1922

THE HARLOW.

The President.

Sale Act, 1878, and the craft in question was a barge propelled by oars. It does not help in the decision of this case.

The question whether by reason of the terms of s. 508 of the Merchant Shipping Act, 1894, the plaintiffs are excluded from the benefit of limitation of liability under that statute depends upon the combined operation of ss. 502, 503 and 508 of that Act, and of s. 1 of the Merchant Shipping Act, 1898, s. 85, Sch. II., of the Merchant Shipping Act, 1906, and perhaps the Merchant Shipping Act, 1921. Sect. 2 of the Merchant Shipping Act, 1894, enacts that "every British ship shall, unless exempted from registry, be registered under this Act," and if not registered "shall not be recognised as a British ship." Sect. 508 has the restrictive words with regard to limitation to which I have already referred. But the Merchant Shipping Act of 1898, as amended by the Merchant Shipping Act, 1906, s. 85, and Sch. II., extends the privilege of limitation of liability to the owners, builders and other parties interested in any ship built at any port or place in His Majesty's dominions, "from and including the launching of such ship until the registration thereof under s. 2 of the Merchant Shipping Act, 1894." I was invited by Mr. Dunlop to construe the words I have just cited as amounting to no more than a grant of the power to limit liability before registration of a ship for such period of time between launching and registering as may be required for the doing of the things necessary for the purpose of registration. To induce such a construction reference was made to the fact that in s. 1 of the Act of 1898 the power of limitation before registration was confined by proviso to a period not exceeding three months after launching, and that the Act of 1906 simply repealed the proviso, leaving the section in a form which does not abrogate the general enactment in s. 2 of the Merchant Shipping Act, 1894, against recognition of an unregistered ship. The Merchant Shipping Act, 1921, s. 1, was cited as supporting this view, in that it extends rights of limitation of liability to "every description of lighter, barge, or like vessel used in navigation in Great Britain, however propelled," and provides for a modified process of registration.

I get no distinct guidance from this Act of 1921, and I do not see my way to construe, as I am invited to do, the Merchant Shipping Act, 1898, s. 1, as amended by the Merchant Shipping Act, 1906, s. 85, and Sch. II. So long as a ship which has been launched remains capable of being registered under s. 2 of the Merchant Shipping Act, 1894, the amending enactments in their literal terms give her owners a right to claim limitation of liability for damages at any time after her being launched and before her being registered. The statute seems to me to be capable of literal and practical application in the present case. The plaintiffs' five barges were admittedly built within the King's dominions—namely, in Great Britain; and I must hold the plaintiffs to be entitled to limit according to s. 503 of the Merchant Shipping Act, 1894, their liability in respect of damage caused by negligent navigation of them. Had my opinion been otherwise I think I must still have held that the plaintiffs could limit their liability in respect of the *Harlow*.

There remains the question what is the right of the plaintiffs as to limitation in relation to the several craft concerned, having regard to the circumstances of the collision or collisions between the *Harlow* and her tow and the *Dalton*.

It is established that the whole of the barges in the *Harlow's* tow were improperly navigated. Which of them, by reason of this improper navigation, caused damage to the *Dalton*? The case for the defendants as presented to me was that the barges constituted in reality a floating mass, and that even if the blow upon the *Dalton* which caused her damage was delivered by the stem of one—namely, the *Silver*—as the plaintiffs allege, all five contributed by their weight and momentum to the damage. Taking into consideration the oral testimony at the trial, as well as the affidavits used by consent at the hearing before me, I find that the *Silver* alone collided with the *Dalton*. The further facts which seem to me to be material and to be established can be shortly stated. The *Silver* and the *Sokoto* were the barges in tow immediately astern of the *Harlow*. At the collision of the *Dalton* with the *Harlow*, the *Silver* and the *Sokoto* were following the *Harlow*

1922

THE HARLOW.

The President.

from the southern side of mid-channel to the northern side on a course nearly athwart the river. The angle of the collision was nearly a right angle. The *Silver* struck the *Dalton* on that vessel's starboard bow with her huff or swimhead. The direction and the nature of the blow were determined in part by the fact that the *Silver* and the *Sokoto* swung round when the tow rope of the *Harlow* parted. The *Sokoto* was at the time alongside the *Silver* and moving with her, and increased the severity of the blow. Both of these barges were loaded with coal. The barges in the next rank were the *Sixteen* behind the *Silver* and the *Fifteen* behind the *Sokoto*. A single barge, the *Agenor*, was in tow in the third rank. The *Sixteen* escaped without damage. The *Fifteen* and the *Agenor* were damaged by collision, the one with the other. The sternpost of the *Fifteen* was split and damage done on her port quarter and her starboard side. The damage to the *Agenor* was on her starboard side amidships. Having regard to the character of the damage to the *Fifteen* and the *Agenor*, and the absence of any damage to the *Sixteen*, the *Silver* and the *Sokoto* by any collision among themselves, as well as to the fact that the barges in the tow ranged alongside the *Dalton* after her impact with the *Harlow*, I have come to the conclusion that the five barges were not massed at the time of the collision of the *Silver* with the *Dalton* and that they did not add by their combined weight or momentum to the force of that collision. The *Sokoto*, however, does appear to me to have moved with the *Silver* at the *Silver's* collision, and to have contributed by her weight and momentum to the damage.

The result of these findings in point of fact is that the negligent navigation of the *Harlow*, the *Silver* and the *Sokoto* caused the damage to the *Dalton*, which was immediately caused by the huff or swim of the *Silver*.

Except for the question which was raised by Mr. Bateson for the plaintiffs upon the view which he presented on their behalf of the effect of the recent judgment of the Court of Appeal in *The Ran* and *The Graygarth* (1), I should have thought that upon principle the damage to the *Dalton* having

(1) Ante, pp. 80, 84.

1922

THE HARLOW.

The President.

been caused by the negligent navigation of three vessels jointly, each vessel might be proceeded against in rem in respect of such damage, and that the plaintiffs, as the employers of all the negligent persons, might be held liable for all the damage, not only in each action in rem, but in proceedings in personam. Mr. Bateson contended, however, that the result of the judgment in *The Ran* (1) is to establish a rule that where tug and tow are both negligently navigated, and damage is done by a blow struck by one of them in the course of the negligent navigation, liability for the damage is to be limited by reference to the tonnage of the vessel which in fact struck the blow. To examine this contention it is necessary to see what were the facts, and the judgment of the Court in the case cited. The tug *Graygarth* being negligently navigated, brought her tow, the *Ran*, into collision with the *Para*. The owners of the *Para* proceeded against the owners of the *Ran* by an action in rem, and, the *Graygarth* and *Ran* being in one ownership, the owners of the *Para* proved that the servants of the common owner who were navigating the tug had brought the tow into collision with the *Para* and thereby caused the damage alleged. They claimed in their action judgment for an award of damages to be enforced against the tow, the *Ran*, and did not make any claim in rem against the tug *Graygarth*. Following upon the judgment which they recovered in their action, they were confronted by the owners of the *Ran* with a claim to limit their liability in respect of the collision by the tonnage of the *Graygarth*. This claim succeeded at first instance, but upon appeal, the owners of the *Para*, who had claimed a decree in rem against the owners of the *Ran*, were held entitled to the decree which they sought, and, inasmuch as their right in rem was against the *Ran*, were held entitled to damages measured by the tonnage of the *Ran*, and not by the tonnage of the *Graygarth*. Mr. Bateson insisted that the Court of Appeal had held the owners of the *Para* entitled to damages against the *Ran*, and not entitled to damages against the *Graygarth*. This contention is, in my judgment,

(1) Ante, pp. 80, 84.

1922

THE HARLOW.

The President.

erroneous. The owners of the *Para* had not claimed a decree against the owners of the *Graygarth* as such. The Master of the Rolls, it will be seen, said this: "The action having been brought against the owners of the *Ran*, they, as represented by their bail, could only be responsible if the *Ran* was improperly navigated and such improper navigation caused the collision. As owners of the *Graygarth* they might be liable also, but in the action in which they were sued as owners of the *Ran* they could only be responsible if the *Ran* was improperly navigated." The *Ran* was found to have been improperly navigated, and judgment went against her owners accordingly. To say that this decision proceeded upon a rule that the vessel in collision can alone be involved in liability, is directly contrary to the statement of the Master of the Rolls with regard to the owners, that "as owners of the *Graygarth* they might be liable also." The simple explanation of the substitution of a judgment in respect of the *Ran* for the judgment which has been entered up in respect of the *Graygarth* seems to me to be that stated by Mr. Dunlop—namely, that the bail given in respect of the *Ran* to the extent of her owners' liability as limited by her tonnage, was sufficient to satisfy the claim of the successful plaintiffs, whereas a liability limited by the tonnage of the *Graygarth* would not have been, and they did not weakly select a smaller or needlessly seek a larger security than their claim required.

To attribute to the decision in *The Ran* (1) the effect attributed to it by the plaintiffs, would, in my opinion, be contrary to the declared reasons of the judgments there delivered. It would also ignore the principle laid down in the House of Lords in *The Devonshire* (2) that except in cases where litigants in collision cases in the Admiralty jurisdiction are held both to blame and division of damages follows, owners of vessels which by improper navigation inflict damage on a third vessel by their joint wrongful act are each made liable for all the damage they help to inflict.

The plaintiffs are entitled to limit their liability in respect of the improper navigation of the *Harlow* and her tow on

(1) Ante, p. 80. (2) [1912] A. C. 634.

1922

THE HARLOW.

The President.

the occasion in question to an aggregate amount made up of 8*l.* per ton of the several tonnages of the tug *Harlow*, the dumb barge *Silver* and the dumb barge *Sokoto*. Questions of limitation in respect of loss of life, which were raised by the pleadings, were admitted to have been disposed of pending the litigation.

Solicitors for the plaintiffs : *Keene, Marsland, Bryden & Besant.*

Solicitors for the defendants, the owners of the *Dalton* : *Thomas Cooper & Co.*

Solicitors for the defendants, the owners of the *Taormina* : *Ince, Colt, Ince & Roscoe.*

E. C. M. T.

DIVORCE.

1921
Dec. 13.
1922
Feb. 1.

CAMPBELL *v.* CAMPBELL.

Divorce—Practice—Restitution of Conjugal Rights—Periodical Payments for Maintenance of Wife—Deduction of Super Tax—Acquiescence—Construction of Order—Arrears—Discretion of Court—Matrimonial Causes Act, 1884 (47 & 48 *Vict. c.* 68), *s.* 2.

An order of the Divorce Division made under the Matrimonial Causes Act, 1884, in a suit for restitution of conjugal rights, directing the husband to pay a certain proportion of his income by way of periodical payments to his wife, subject to specified deductions, does not entitle him to deduct super tax from his whole income in calculating the proportion to be paid. The relative positions of husband and wife under such an order are not those of debtor and creditor. A wife cannot release her husband's liability to make payments under such an order, and her acquiescence in his making any deduction does not prevent her afterwards complaining thereof. But the Court has a discretion as to what, if any, arrears may be enforced; and in exercising its discretion will consider all the circumstances and the conduct of each party, including the nature and causes of any acquiescence by the wife.

On February 2, 1914, the petitioner, Mrs. Campbell, obtained a decree for restitution of conjugal rights against the respondent, her husband. That decree was not obeyed. The petitioner then filed a petition for periodical payments. On April 7, 1914, the Registrar reported that the respondent

1921

CAMPBELL v. CAMPBELL.

was entitled to a share under his father's will, so long as he did not incumber it, which varied in amount. In 1912–1913 he had received 4840*l.*, but that was an increase upon the two preceding years. This income was paid to him by his father's trustees by four quarterly payments of 500*l.* each in January, April, July and October, and the balance for the year in August. The Registrar reported that the respondent should be ordered to pay to the petitioner one-third of each of the quarterly payments of income made to him, and one-third of the balance paid in August, subject to certain deductions. On May 25, 1914, the Court made an order confirming the Registrar's report in all respects, except that the deductions permitted were slightly increased.

At the date of this order the income of the respondent was not subject to super tax, but afterwards, when the limit of exemption was lowered, it became so subject. In making his returns for assessment of super tax the respondent deducted the amount which he paid to the petitioner and only paid super tax on the balance of his income. But in calculating the net income, one-third of which he was ordered to pay to the petitioner, he deducted from his gross income not only the deductions allowed by the order but the amount he had paid for super tax. These deductions had been made since the year 1915, but no objection to them had been made on behalf of the petitioner.

This summons was taken out by the petitioner on October 21, 1921, for leave to issue execution for the sum of 672*l.* 8*s.* 10*d.*, alleged to be the sum by which the periodical payments ordered to be paid to the petitioner were reduced by the deduction of super tax from 1915 to 1921. It appeared at the hearing that the correct amount of such deduction was only 542*l.* 8*s.* 8*d.*

Income tax on the sums paid to the respondent by the trustees of his father's will had always been deducted by them, and no question was raised about this.

du Parcq for the petitioner. The respondent had no right to deduct the super tax in any case, and certainly not where

he had paid it only on the two-thirds of the income which he had retained. The petitioner is entitled to be reimbursed in respect of the year preceding the summons. The case of *Watkins* v. *Watkins* (1) appears to be against her recovering the whole of the arrears, but the period for which she should be allowed them is, I submit, in the discretion of the Court; and under the circumstances of this case, I ask the Court to exercise its discretion in favour of the petitioner by allowing her the whole.

Bayford K.C. and *W. O. Willis* for the respondent. The scope and intention of the order made by the Court was that the money actually received by the husband, after taxes had been paid and provision made for certain specified liabilities, should be divided into thirds, and one-third paid to the wife. The income tax was deducted by the trustees before paying the husband.

du Parcq. I do not object to the deduction of the income tax, only of the super tax.

Bayford K.C. Super tax is only an additional income tax and stands on the same ground. The intention of the order was that only the income which would be available for the joint household should be divided. The wife had assented to all these deductions.

In any case the petitioner cannot recover more than one year's arrears: *Watkins* v. *Watkins.* (1)

In re Stillwell (2) was a case of alimony and there was no question of acquiescence, but only one year's arrears was in question there.

Cur. adv. vult.

Feb. 1. SIR HENRY DUKE P. [after stating the facts continued:] The questions between the parties, other than that as to the effect of the order, relate to the computation and amount of the final annual payments made in August of each of the several years since the date of the order. The respondent's representatives have paid quarterly as directed one-third part of the sum received quarterly by the respondent

(1) [1896] P. 222. (2) [1916] 1 Ch. 365.

1922

CAMPBELL v. CAMPBELL.

The President.

and, at or about the end of August in each year, they have prepared and forwarded to the petitioner's representatives an account of the sums received by the respondent for the whole year and of the balance they admitted to be payable by the respondent to the petitioner, and have paid the sums so shown to be due. Against the total income of the respondent they have debited in each year the allowance mentioned in the order of 100*l.* in respect of debts and insurance policies. They have also debited in each account an amount paid in the course of each year by the respondent to the Commissioners of Inland Revenue by way of super tax. The respective amounts under consideration in the present inquiry were these:—

	Total receipts.			Deduction for super tax.		
	£	*s.*	*d.*	£	*s.*	*d.*
1915	4200	0	0	148	12	4
1916	4325	0	0	54	0	0
1917	4500	0	0	51	0	0
1918	4760	17	2	299	19	0
1919	8919	10	1	785	18	6
1920	3293	2	6	261	17	0
1921	1914	0	6	25	19	4

Income tax upon the total amounts receivable by the respondent from the trustees of the will has been at all times paid by the trustees.

In 1921, owing to a demand for super tax by the Commissioners of Inland Revenue, the petitioner's solicitors inquired of the respondent's solicitors as to the super tax deductions in the accounts, and were informed that during the preceding six years the respondent had paid to the petitioner one-third of his net income after payment of the super tax for which he was liable. The petitioner's solicitors objected that the deductions so made were not justifiable.

Whether the petitioner or her solicitors had in fact understood the basis on which super tax had been deducted, or had considered with any closeness what were the petitioner's rights in the matter I do not know. Their action with regard

to this account was regarded by the respondent's counsel as having a material bearing upon the questions of discretion which are involved in this case. They asserted upon the respondent's behalf a right, upon the true construction of the order of May, 1914, to deduct from the payments made to him in each year the sum paid by him for super tax in that year in order to arrive at the income, the third part of which he is required by that order to pay to the petitioner. The purpose of that order, they argued, was to provide a maintenance for the petitioner out of the income which was available to the respondent for the support of himself and his family. It was further contended that, even if the order could not be so construed, the petitioner by her acquiescence from 1915–1921 in the construction put upon the order by the respondent, had disentitled herself from afterwards maintaining any further demand in respect of that period.

Further it was claimed that having regard to the nature of the order the Court would, in the exercise of its discretionary authority, refuse to require any further payments for past years, and in any event would not make any order of a retrospective effect for a period of more than one year.

Whether the order warrants any deduction for super tax is the first question. The deductions in fact made were not discussed in detail before me, and the details affect only the later and subsidiary questions. Now the submission in the Registrar's report on which the order proceeded identifies the fund to be divided in express terms: "the sums received from the trustees quarterly and the balance paid by the trustees to the respondent annually," subject only to certain specified deductions. The order of the Court confirms the report with a slight variation; it describes the divisible fund however as the "gross income of the respondent" and the variation it makes is to increase one of the authorized deductions. I find it impossible to say that the order, in the prima facie meaning of the words used, authorizes the respondent to make any deductions from the specified receipts, besides those which it specified, or to

1922

CAMPBELL v. CAMPBELL.

The President.

debit the petitioner with one-third of his own liability for super tax.

Mr. Bayford argued that super tax is a form of income tax; that payment "at the source"—i.e., by the trustees—was admittedly a proper mode of dealing with income tax proper, to which the whole income was chargeable; and that the respondent in debiting the sums received by him with the super tax due from him in respect of them, was doing no more than to extend the same mode of treatment to the whole of an identical subject matter. I do not take this view, and if it were adopted it would lead to some curious consequences. For instance the petitioner would contribute on the gross income received by the respondent in 1918–1919 one-third of the super tax payable by him of about 970*l.*—i.e., upwards of 320*l.*—whereas the super tax, if any, due from her on the sums payable to her under the order, being less than 3000*l.*, would not exceed 60*l.* I think, however, that the terms of the order itself are clear enough to make this part of the discussion merely academic.

The claim made on the respondent's behalf to treat the accounts rendered by him from 1915–1921 as stated and settled accounts fails for various reasons. The relation of the respondent and the petitioner is not that of debtor and creditor. The order of May, 1914, assigned no property and created no debt. What is created by the order is not a chose in action in the petitioner, but an obligation in the respondent to pay to his wife what has been called a purely personal allowance for her maintenance. She cannot issue execution without leave, or assign or release her interest. This appears from cases like *Linton* v. *Linton* (1) and *Watkins* v. *Watkins*. (2) Since an express agreement by the wife would not discharge the husband's liability, it clearly cannot be discharged by tacit consent or mere inaction.

Although the arguments to which I have referred were advanced on the respondent's behalf, his case was most forcibly directed to the discretionary control of the Court

(1) (1885) 15 Q. B. D. 239. (2) [1896] P. 222.

over the enforcement of arrears of maintenance ordered to be provided for a wife by her husband. This discretionary authority is clearly established by decisions in the Ecclesiastical Courts and in this Division. These authorities are not express decisions on the language of the Matrimonial Causes Act, 1884, but they deal with what is in kind the same subject matter, the order of the Court for periodical payments by a husband for the maintenance of his wife. Among the conspicuous instances in which the question of discretion has arisen are *De Blaquiere* v. *De Blaquiere* (1); *Wilson* v. *Wilson* (2); *Watkins* v. *Watkins*. (3) In the last-named case the existence and exercise of the discretion was confirmed by a judgment of the Court of Appeal.

Where the wife's abstention from making application to this Court has been due to some arrangement between her and her husband, although the arrangement may have been unenforceable, the compulsory authority of the Court has been carried no further than to compel payment of recent arrears. In *Wilson* v. *Wilson* (2) and *De Blaquiere* v. *De Blaquiere* (1) the arrears enforced were in substance those which accrued pending the suits. In *Watkins* v. *Watkins* (3) arrears of about twenty months were ordered to be paid. For the respondent it was suggested here that one year's arrears is the utmost amount that the Court will order to be made up in cases of this kind. I think there is no arbitrary limit, and that if justice requires, the whole amount of any arrears may be enforced.

In the typical cases I have mentioned the parties had bargained, though inconclusively. Here there is not alleged to be more than acquiescence in an erroneous system of accounts under which the petitioner's allowance was underpaid year by year. The item of super tax in the accounts is not self-explanatory. For example the super tax payable in 1914–1915, on an income of 4200*l.* was not 148*l.* 12*s.* 4*d.*, nor in 1918 on an income of 4760*l.* was the amount payable 299*l.* 19*s.* Nor do the petitioner or her advisers appear to

(1) (1830) 3 Hagg. Ecc. 322. (2) (1830) 3 Hagg. Ecc. 329n.
(3) [1896] P. 222.

1922

CAMPBELL v. CAMPBELL.

The President.

have appreciated the effect of debiting equally upon a smaller and a larger income the super tax payable upon the combined amounts.

There are in this case no circumstances of plain mutual arrangement, or of acquiescence practised for the advantage of the acquiescent party, such as in some cases have guided the exercise of the discretion of the Court. If the claim to a personal allowance is waived in consideration of some other advantage which has been received, it would be, as I think, an unfortunate exercise of the powers of the Court which would compel subsequent literal performance of the order requiring the allowance.

I have considered in this case the nature and causes of the petitioner's inaction, and the situation and conduct of each of the parties, as well as the question of hardship which was urged for the respondent, and have come to the conclusion that the order proper to be made is this: Declare the petitioner to be entitled under the order of May 25, 1914, to receive the payments directed thereby free of any deduction on account of super tax paid or to be paid by the respondent. Direct the respondent to pay to the petitioner in respect of the arrears due to her on the footing of such declaration 300*l.* If 100*l.* of this sum be paid before April 3, 100*l.* within six months, and 100*l.* within twelve months from to-day, no process of execution to issue. If default be made in either of such payments, petitioner to be at liberty to issue execution for so much of the sum of 300*l.* as may then remain unpaid. The petitioner to have the costs of this summons.

Solicitors for petitioner: *Aylett & Gotto.*

Solicitors for respondent: *Mewburn Walker & Cato.*

J. R. B.

PROBATE.

1922
March 24.

In the Estate of ROBERT GAULT (DECEASED).

Probate—Practice—Resealing Probate granted by the High Court of Justice in Northern Ireland—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *ss.* 38, 40, 41, 61—*Colonial Probates Act*, 1892 (55 & 56 *Vict. c.* 6).

The Government of Ireland Act, 1920, gives to His Majesty's High Court of Justice in Northern Ireland all such jurisdiction as was then exercised by the High Court of Justice of Ireland. This includes the granting of Probate. And, therefore, a Probate granted by that Court can be resealed in the Probate Court in England, according to the practice before the Government of Ireland Act, 1920.

ROBERT GAULT died on November 28, 1921, in London, domiciled in Northern Ireland, leaving real and personal estate in Northern Ireland, and personal estate in England amounting to 11,123*l.* Duty on the whole estate to the amount of 6140*l.* had been paid to the Ministry of Finance at Belfast on February 7, 1922, and probate of the deceased's will and three codicils had been granted to the executors in the High Court of Justice in Northern Ireland, King's Bench Division (Probate), on February 15, 1922.

The executors in order to realize the English assets applied to the Probate Registry to reseal that grant in accordance with the procedure hitherto in force with regard to Irish grants, but the Registry raised the question whether, having regard to the Government of Ireland Act, 1920, the probate could be resealed except under the Colonial Probates Act, 1892, and refused to reseal the grant without the direction of the judge.

The executors now moved for an order that the grant of Probate be resealed.

Sidney Isaacs (*Richard O'Sullivan* with him) for the motion. The Colonial Probates Act, 1892, only applies to His Majesty's possessions to which it has been expressly made applicable by Order in Council, and no such Order has been made for Ireland. On the true construction of the Government of Ireland Act, 1920, ss. 38, 40, 41 and 61, the High

1922

GAULT, *In the Estate of.*

Court in Northern Ireland took the place in regard to Northern Ireland of the former High Court of Justice for Ireland; and the provisions of the Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), s. 95, applying to the High Court should be read as now applying to the High Court in Northern Ireland. The Government of Ireland Order in Council of November 21, 1921, though it did not expressly deal with the matter, was only consistent with that view.

SIR HENRY DUKE P. I think an order should be made in the terms of the notice of motion. For the reasons Mr. Isaacs has pointed out it is not possible to apply the Colonial Probates Act, 1892, in this case. No Order in Council applying that Act to Ireland has been made, and I do not think one was ever contemplated. It suffices, however, in my opinion, to say that the Government of Ireland Act, 1920, authorizes and requires resealing here of letters of administration granted by His Majesty's High Court of Justice in Northern Ireland, which has been substituted for the High Court of Justice, Ireland. Its grant has the same validity as the grants of that Court heretofore had. The Government of Ireland Order in Council, 1921, only indirectly bears on the question, but shows quite clearly that His Majesty had been advised to proceed on the footing that the Government of Ireland Act, 1920, was effective to deal with the matter.

The grant, one of probate, will therefore be resealed. Questions of security which may arise on a grant of administration will be dealt with when they arise.

Solicitor: *Herbert Z. Deane.*

J. R. B.

ADMIRALTY.

1922
Feb. 13;
March 13.

THE TERVAETE.

Shipping—Collision—Maritime Lien—State-owned Vessel—Unenforceable Lien—Vessel sold into Private Ownership—Revival of Lien.

Damage occasioned by collision with a state-owned vessel imposes a maritime lien upon the vessel, notwithstanding that the lien is unenforceable against the will of the sovereign state; and if the vessel be subsequently sold into private ownership so that the lien can be enforced without directly or indirectly impleading the sovereign state, the vessel is then liable to arrest in an action in rem.

MOTION to set aside a writ in rem and to discharge an undertaking to appear and put in bail.

The following statement of the facts is taken from the judgment of the learned President:—

"This is an action in rem brought by the plaintiffs, the owners of the steamship *Lynntown*, to recover damages in respect of a collision which is admitted to have taken place between that ship and the defendants' steamship *Tervaete* on May 16, 1920, in the port of Bonanza on the Guadalquivir River. The plaintiffs issued and served the writ on January 10, 1922, the *Tervaete* being then in Barry Dock. They refrained from arresting the vessel in consideration of an undertaking by the solicitors for the defendants to enter an appearance and put in bail. Appearance was entered under protest 'to stand as unconditional unless the defendants should within twenty-one days obtain an order to set aside the writ and service.' Motion was then made by the defendants and brought to hearing within twenty-one days to discharge the undertaking of the solicitors and to set aside the writ.

"The *Tervaete* was one of the vessels which were surrendered by Germany under the Treaty of Versailles to the Allied and Associated Powers and upon or after such surrender she became vested in the Government of His Majesty the King of the Belgians. At the time of the collision she was being run by the Belgian Government as a cargo boat, for their

1922

THE TERVAETE.

public purposes. What was the exact nature of her employment at the time of the collision did not appear, but she was subject in the port of Bonanza to the local harbour regulations relating to merchant ships. After the collision, at a date which is not material, the vessel was apparently transferred by the Belgian Government to the Armement Maritime Belge, and at the time of action brought she was, as she now is, the property of the Société Anonyme Belge d'Armement et de Gérance."

E. A. Digby for the defendants in support of the motion. The maritime lien for damage never attached to the *Tervaete,* and therefore could not be revived when the vessel was sold into private ownership. There can be no claim in rem against a state-owned vessel, the only remedy is against the actual wrongdoer: see *The Athol* (1); and "the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time": per Brett L.J. in *The Parlement Belge.* (2) See also *The Castlegate* (3), where Lord Watson said that the general principle of the maritime law was that "inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability"; and in *The Utopia* (4) Sir Frances Jeune in delivering the judgment of the Privy Council made observations to the same effect.

[Reference was also made to *The Porto Alexandre* (5) and, on the question of the appearance under protest, *The Jassy.* (6)]

C. R. Dunlop K.C. and *Dumas* for the plaintiffs. No objection to the proceedings has been taken by the Belgian Government which is not being impleaded. The affidavit in support of the motion is made by the Belgian Vice-Consul at Cardiff acting on behalf of the defendants, a commercial firm. The maritime lien for damage attached when the

(1) (1842) 1 W. Rob. 374.
(2) (1880) 5 P. D. 197, 218.
(3) [1893] A. C. 38, 52.
(4) [1893] A. C. 492.
(5) [1920] P. 30.
(6) [1906] P. 270.

collision took place, although the remedy could not be exercised against the will of the Belgian Government as long as the vessel remained in state ownership. The passage in *The Parlement Belge* (1) relied on by the defendants is obiter, and further had reference to a different state of facts—Lord Esher was discussing the question whether a lien could attach to a ship in the hands of a subsequent owner where there was no negligence in the servants of the owners at the time of the collision. *The Newbattle* (2) shows that there may be a good cause of action against a foreign government ship; and unless the sovereign state through the proper diplomatic channels takes objection the proceedings are good: cf. *The Annette and The Dora.* (3)

[Reference was also made to *The Prins Frederik.* (4)]

Digby in reply. No personal action could have been brought against the sovereign owner, and if there is no personal liability there is no liability in rem. The plaintiffs' only remedy is by an action in personam against the actual wrongdoer.

[*The Ticonderoga* (5) was referred to.]

Cur. adv. vult.

March 13. THE PRESIDENT (SIR HENRY DUKE) read the following judgment. [After stating the facts the judgment proceeded:] The substantial question between the parties is whether the plaintiffs have, or can in law have, a maritime lien on the *Tervaete* for the damage caused to them by her collision with the *Lynntown*, notwithstanding that at the time of the collision the *Tervaete* was a vessel of the Belgian State employed for the public purposes of the state.

Questions which had been raised on the part of the plaintiffs as to whether the vessel was at the date of the writ owned absolutely by private owners were waived at the hearing, and on the plaintiffs' part the motion was treated as a motion to set aside the writ and subsequent proceedings

(1) 5 P. D. 197.
(2) (1885) 10 P. D. 33.
(3) [1919] P. 105.
(4) (1820) 2 Dods. 451.
(5) (1857) Swa. 215.

1922

THE TERVAETE.

The President.

without insistence on the fact that the solicitors' undertaking for an appearance and bail had been unconditional. No question of Belgian law was raised. For the defendants it was contended at the hearing that a maritime lien at no time attached to the ship in respect of the damage done by the collision. Damage resulting from negligent navigation of a ship by the servants of a state was said to give no other right to the person suffering damage than that of personal action against the wrongdoer. For the plaintiffs it was argued that a maritime lien for damage negligently caused by collision comes into being with the damage, and that where a vessel belonging to a sovereign owner is concerned, although that owner cannot be impleaded, directly or indirectly, nevertheless if the ship be transferred to an individual owner the lien may as against him be enforced by judicial process.

No direct authority upon the main question at issue was cited on either side. Counsel for the defendants, however, relied upon a passage in the judgment of the Court of Appeal delivered by Brett L.J. in *The Parlement Belge* (1), with regard to the nature and effect of a maritime lien. Lord Esher said this: "The property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued." Upon a literal construction of the sentence the words would appear to warrant the contention of the defendants. The Court of Appeal, however, was dealing with a case which did not raise the questions I now have to decide. The judgment in *The Parlement Belge* (1) related to an action in rem brought against a foreign sovereign by arrest of a vessel engaged at the time in his public service. The main question at issue in the case was whether the principles of international law which exempt the armed ships of a state from the judicial processes of a foreign state extend like exemption to a vessel employed as the *Parlement Belge* was, in the carriage of mails, passengers and passengers' luggage. The Court declared the law generally in these terms: "As a

(1) 5 P. D. 197, 214, 218, 219.

consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement subject to its jurisdiction." The Court also examined the contention that in an action in rem the owner of the property concerned is not directly or indirectly impleaded, and declared that by an action in rem the owner of the property is indirectly impleaded, and that "the case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any Court." Neither of the conclusions I have cited is decisive of this case. The dictum which is relied upon by the defendants follows a passage in which Brett L.J. discussed the case of vessels brought into collision by the negligence of persons who are not servants of the owner, as for example negligence of a compulsory pilot. The statement that "the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time," means, I think, that if the collision was not due to negligence of the servants of the then owner no lien will attach to the ship so as to make her subject to proceedings in the hands of a subsequent owner.

There are passages in the judgment of Lord Watson in *The Castlegate* (1) and in the judgment delivered at the Privy Council by Sir Francis Jeune in *The Utopia* (2), which no doubt must also be considered in this case. Lord Watson, in discussing maritime lien, said: "The general principle of the maritime law, which I understand to be that, inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root

(1) [1893] A. C. 38, 52.

(2) [1893] A. C. 492, 499.

1922

THE TERVAETE.

The President.

in his personal liability." Sir Francis Jeune said: "It was suggested in argument that, as the action against the *Utopia* is an action in rem, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognised. No doubt at the time of the action brought, a ship may be made liable in an action in rem, though its then owners are not, because, by reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence." The concluding words of the passage I have just cited show, I think, the underlying principle of both these statements of the law.

The present case must be decided upon the general principles of maritime law which are exemplified in *The Parlement Belge* (2), but unfortunately without the guidance of any decision upon the precise questions which are here raised. These seem to me to be in substance three: Could the Belgian state by its servants employed in the management of a public ship so act as to create obligations of the state of which a Court of law may take account? Could the *Tervaete* notwithstanding her public character and employment be subjected by the Belgian state or its servants to a maritime lien? Is the immunity from foreign jurisdictions of sovereign states and their agents and their property due to a principle that their acts can involve no legal consequences and their property is subject to no legal obligation, or is such immunity due only to absence or jurisdiction in the Court?

If no acts of the Government or its servants could subject property of the state to an obligation cognizable at law, or if a public ship situated as the *Tervaete* was cannot become subject to a maritime lien, the plaintiffs here have no action in rem. If the fact be otherwise, and the immunity of foreign governments from legal process is due merely to the limited

(1) 5 P. D. 197.

1922

THE TERVAETE.

The President.

extent of the jurisdiction of the Courts concerned—to the fact, as was said in *The Parlement Belge* (1), that every state "declines to exercise jurisdiction over the person of any sovereign or ambassador of any other state or over the public property of any state which is devoted to its public use"—then the question whether the plaintiffs have an action in rem will depend upon the same considerations as would arise in any case of collision between merchant vessels in private ownership.

I am not aware of any authority which decides that the acts of foreign sovereigns and their servants are not capable of having juristic effect. Early in the history of English law, as appears from Lord Coke's well-known statement in *Calvin's Case* (2), a foreign sovereign was a possible defendant in English Courts. A foreign state may acquire property, alienate it, or charge it, and vindicate its rights of property before English tribunals. Such a state, if it takes no objection to the jurisdiction, may be the subject of an adverse judgment in respect of rights it has granted or obligations it has incurred. If a foreign sovereign sues in England the party sued may enforce rights against the sovereign plaintiff by a counterclaim, and in the determination of their relative rights the acts and omissions of each will, speaking generally, be adjudicated upon in accordance with one set of legal principles equally applicable to each, though when judgment is given no process of execution can issue against the sovereign litigant or his property.

In *The Newbattle* (3) the King of the Belgians was plaintiff in an action for damage by collision. The defendants in the action counterclaimed for their damage by the collision, and by an order of this Court, affirmed by the Court of Appeal, the plaintiff was ordered to give security to answer the counterclaim. If in truth negligence of the servants of a sovereign state can give no cause of action, security to answer a counterclaim in such a case would have been idle. It is worthy of note, too, that Lord Esher in the course of his judgment

(1) 5 P. D. 197.

(2) (1609) 7 Rep. 1.

( ) 10 P. D. 33.

1922

THE TERVAETE.

The President.

in the Court of Appeal distinguished between a power of adjudication in the suit when the sovereign concerned had become a party, and the power to issue process of execution against the ship in question in case of an adverse judgment, and treated the sovereignty of the plaintiff rather as a ground of possible exception to the jurisdiction of the Court than as a condition which made any claim at law impossible.

Whether or not the acts of public servants may give the right to a judicial remedy against a sovereign employer, it would no doubt be true that if the public property of states, used for their public purposes, is free from all operation of municipal law, no acts or omissions of the sovereign owner of a ship, or his servants, could impose upon the ship a maritime lien. Such a principle of exclusion or exemption has been said to exist. A classic instance is found in the argument of the Admiralty Advocate, Dr. Arnold, in *The Prins Frederik* (1) which as to its conclusion has been accepted by Lord Esher in *The Parlement Belge* (2) and cited with approval in *The Broadmayne.* (3) The passage in *The Prins Frederik* (1) which is relevant to this discussion is in the following terms: "We submit that there is a class of things which are not subject to the ordinary rules applying to property; which are not liable to the claims or demands of private persons; which are described by civilians . . . . as extra commercium, and quorum non est commercium, and in a general enumeration are denominated sacra, religiosa, publica—publicis usibus destinata. If a more specific enumeration be made, amongst these will be found the forum, the basilica, the walls, and bulwarks of a city. These are things which are allowed to be, and from their nature must be, exempt and free from all private rights and claims of individuals; inasmuch as if these claims were to be allowed against them, the arrest, the judicial possession, and judicial sale incident to such proceedings, would divert them from those public uses to which they are destined." Though Dr. Arnold's argument in *The Prins Frederik* (1) has been cited with approval in our Courts, this particular

(1) 2 Dods. 451, 468. (2) 5 P. D. 197.

(3) [1916] P. 64.

proposition has never so far as I am aware been said to be a statement of English law. The conception of a class of things incapable of being subjected to proprietary rights or personal claims was referred to the Roman law, from which the specific illustrations are drawn, and the conclusion which was enforced by the argument was that things dedicated by the state to its public uses are not subject to legal arrest or judicial sale. It is in that sense, I think, that Dr. Arnold's argument was adopted in *The Parlement Belge*. (1)

It is not necessary here to consider what possessions of a state, if any, are in their nature incapable of being alienated or subjected to charge by acts of the sovereign or his officers. I see no ground for presuming that the *Tervaete* was ever found in such a category. She was a merchant vessel capable, as I suppose, at all material times of being alienated or charged, and she was in fact disposed of in due course by the Belgian Government to the now defendants. Public property of foreign states which has been rendered subject to claims of individuals without being wholly alienated by the state concerned has sometimes been dealt with in English Courts while the interest of a sovereign owner subsisted. In *Gladstone* v. *Musurus Bey* (2) where money of the Turkish Government had been paid into the Bank of England under the terms of a contract of the Government for the grant of a trading concession; upon allegation of an intention of the Government by its representatives to withdraw the fund and apply it to other uses, the Court by injunction restrained the bank from making payment pending the suit. So, in *Larivière* v. *Morgan* (3) Lord Hatherley L.C. laid it down that where a foreign government has made a contract in this country and has lodged money in the hands of agents in this country for payment of the sums to be due under the contract, the Court will not refuse its aid to the contractor because the contract is with a foreign government, nor because the foreign government does not appear before the Court. Lord

(1) 5 P. D. 197.

(2) (1862) 1 H. & M. 495; 32 L. J. (Ch.) 155.

(3) (1872) L. R. 7 Ch. 550, 560.

1922

THE TERVAETE.

The President.

Hatherley, in the course of his judgment, puts the case of a foreign government having placed in this country a sum of money, and having charged it with trusts to be performed, subject to which the balance is to be paid back to the foreign government, and asks: "Is it possible to say that in such a case the trustee is not liable to perform the trust because the foreign government, one of the cestuis que trust, cannot be made to appear?"

Many new questions will arise when sovereign states frequently employ their ships in undertakings of a commercial nature. Assume a merchant vessel which is already subject to a maritime lien to be acquired by a sovereign state, will the lien be discharged, or upon a resale will it revive? If a state-owned cargo boat is salved, and without compensation to the salvor the vessel is sold within this jurisdiction, will the salvor have no claim against her, capable of being enforced here? If the master of such a vessel finds it necessary to give a bottomry bond for repairs obtained in a remote port where no advance can be got upon the credit of the state, and the vessel is afterwards sold by the state, the obligee being unpaid, will he have no enforceable right against the ship? The principles involved in each of these supposititious cases are in question here. The position of an ambassador is necessarily distinguishable from that of a sovereign state immediately concerned. But the ambassador has the same absolute immunity from the judicial process of foreign states as is enjoyed by the state whose representative he is. I put to the defendants' counsel the case of a collision between yachts, one belonging to an ambassador and one to a private owner, if after the ambassador's immunity from process had ceased, action in rem should be taken against his yacht. I think it is not entirely irrelevant to the first of the two questions with which I am dealing here.

On the whole I think that the immunity from legal process of the public ship of a foreign state, while it is in the hands of the state, does not arise from a rule that the vessel is, to use the language of the civil law, extra commercium. I think also that this immunity does not involve the conclusion that

such a ship is incapable of becoming subject to obligations to which individual owners may subject ships. I cannot suppose that a sovereign state which could convey its ships to private owners could not hypothecate them. Could the state, then by acts of its agents, subject a ship to a maritime lien? Gorell Barnes J. in defining a maritime lien in the course of his judgment in *The Ripon City* (1) says: "It is a right acquired by one over a thing belonging to another—a jus in re alienâ. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner, either directly or through the acts of persons deriving their authority from the owner." Gorell Barnes J. goes on to say: "The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner."

I have assumed that a sovereign state may by virtue of its proprietary rights over a ship hypothecate the ship, and that although the state could not be impleaded in a foreign Court in respect of the hypothec, the transaction would be valid. Why may not the same state by its agents impose a maritime lien upon a public ship of the state, and, although the state may not be impleaded, why may not the lien be valid for all purposes which do not depend upon the employment of legal process against the state?

I come to the conclusion that the ground on which jurisdiction over the public ships of foreign states is declined in our Courts is not that the acts of sovereign powers by their servants are incapable of conferring rights or creating obligations which may be put in suit, nor that the public property of the states used for their public purposes cannot because of its public character be subjected to claims by individuals which are capable of judicial cognizance. In the well known case of *The Exchange* (2), Marshall C.J. delivered the judgment of the Supreme Court of the United States to the effect that the exemption from process of the public vessels of foreign powers is founded upon "an implied promise . . . . that she should be exempt from the jurisdiction of the country."

(1) [1897] P. 226, 242. (2) (1812) 7 Cranch, 116, 147.

1922

THE TERVAETE.

The President.

Brett L.J. in *The Parlement Belge* (1) spoke of such public property as being "but for the common agreement, subject to the jurisdiction."

Holding as I do that a foreign state by its authorized agents may impose a charge or lien upon one of its public ships, and that the charge or lien may be enforced, if it can be done without directly or indirectly impleading the foreign state, what remains here is a case of alleged maritime lien, within the jurisdiction of the Court, and capable of being carried to judgment and to execution without any assertion of jurisdiction over any foreign sovereign or any property of a foreign state.

The application of the defendants for a stay of proceedings fails.

Solicitors for the plaintiffs: *Holman, Fenwick & Willan, for Lean & Lean, Cardiff.*

Solicitors for the defendants: *Downing, Middleton & Lewis, for Downing & Hancock, Cardiff.*

(1) 5 P. D. 197, 215.

E. C. M. T.

ADMIRALTY.

1922
March 27.

THE LOREDANO.

Shipping—Collision—Limitation of Actions—Action by Lords Commissioners of the Admiralty—Writ issued more than Two Years after cause of action—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *ss.* 8, 10—*Applicability to King's Ships.*

The provisions of the Maritime Conventions Act, 1911, do not bind the Crown, and an action by the Lords Commissioners of the Admiralty in respect of damage to one of His Majesty's ships need not be instituted within two years from the date of the damage as provided by s. 8 of that Act.

SUMMONS (adjourned into Court) directed to the Lords Commissioners of the Admiralty to show cause why they should not either apply for leave to maintain an action, or alternatively submit to have their action dismissed, on the ground that the proceedings therein had not been commenced within two years.

On July 15, 1917, there was a collision in the Mediterranean between H.M.S. *Salome* and the Italian steamship *Loredano*. On March 15, 1922, the plaintiffs, the Lords Commissioners of the Admiralty, issued their writ in the present proceedings, the *Loredano* being then within the jurisdiction.

Sect. 8 of the Maritime Conventions Act, 1911, provides that "no action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel . . . . unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused." Sect. 10 enacts that: "This Act . . . . shall be construed as one with the Merchant Shipping Acts, 1894 to 1907." Sect. 741 of the Merchant Shipping Act, 1894, provides that the "Act shall not, except where specially provided, apply to ships belonging to her Majesty."

The arguments sufficiently appear from the judgment.

Alfred T. Bucknill for the owners of the *Loredano*, in support of the application.

1922

THE LOREDANO.

Sir Ernest Pollock A.-G. and *Balloch* for the Lords Commissioners of the Admiralty.

THE PRESIDENT (SIR HENRY DUKE). This is a matter of public importance, and the summons will be taken to be adjourned into Court for judgment.

The action is brought in the name of the Commissioners for executing the office of the Lord High Admiral of the United Kingdom against the owners of the steamship or vessel *Loredano* to recover damages in respect of a collision between H.M.S. *Salome* and the *Loredano*, which occurred in July, 1917. An application has been made by the defendants that the plaintiffs should show cause why they should not either apply for leave to maintain their action, or, alternatively, submit to have their action dismissed on the ground that the proceedings in the action were not commenced within two years from the date of the collision. The Attorney-General has appeared to establish on behalf of the Crown the contention that the limitation contained in s. 8 of the Maritime Conventions Act, 1911, does not bind the Crown. The contention is founded upon two grounds. It is founded first upon the general proposition that the statute is a statute of limitation, and that it is well settled law that no statute of limitation binds the Crown, unless the Crown be found to be expressly included within its terms. The Attorney-General cited a case in the Privy Council—*Attorney-General for New South Wales* v. *Curator of Intestate Estates* (1)—which was not on the construction of a statute of limitation, but raised the question whether the Crown was bound by provisions of an Act of the Parliament of New South Wales whereby certain assets of deceased persons were protected from payment of certain debts of those persons, and in that case Sir Arthur Wilson, who delivered the judgment of the Privy Council, made this statement of the law: "The question therefore arises whether the present Act binds the Crown. The Crown is not named in it, nor can their Lordships see any clear indication of an intention to

(1) [1907] A. C. 519, 523.

1922

THE LOREDANO.

The President.

bind the Crown. Prima facie, therefore, the Crown is not affected by it." That is a statement, in a carefully limited form, of the prerogative of the Crown with regard to the exemption from the operation of statutes, not in particular statutes of limitation. The rule with regard to statutes of limitation has been more emphatically stated in other decisions, and it is summed up in a very express statement in the passage which the Attorney-General cited from Robertson's Civil Proceedings By and Against the Crown, 1908 edition.

Taking the statute as it stands, it is not suggested that the Crown is expressly included in its provisions, and, after listening to the argument in which Mr. Bucknill has carefully protected the interests of the defendants, I am not able to find that by implication the statute extends to the Crown. Mr. Bucknill made reference to the comprehensive character of the Maritime Conventions Act, and to the proviso to s. 8, and argued that the term "vessel" must be taken to mean "any other vessel." That is no more comprehensive than is the legislation in an infinite variety of Acts of Parliament where such legislation in no way affects the prerogative of the Crown. Mr. Bucknill argued that in order to give effect to the contention raised on behalf of the Crown, the words "a vessel" in s. 8 must be read as "A vessel other than a vessel of His Majesty the King." By well established principles of law it seems to me that every statute must be construed, where the King is not named, as though it contained a limitation of some such words as those which Mr. Bucknill applied to this case. The prerogative of the Crown is saved by operation of law, and the statute is construed with reference to the principle. Mr. Bucknill pointed out that on the Crown's argument personal actions in respect of injuries sustained by persons on board one of His Majesty's ships would not be limited. But personal claims form no part of the prerogative of the Crown. A limitation of action by an individual is no infringement of either an immunity of the Crown, or a right of the Crown. Reference was made to the decision in H.M.S. *Archer* (1), where, with regard to a personal

(1) [1919] P. 1.

1922

THE LOREDANO.

The President.

action, this statute was treated as having application. That decision, I think, does not affect the question which is here under consideration. It seems that the question which is here raised was not raised there, and did not arise. Mr. Bucknill contended further that it would be inequitable to limit the operation in the manner for which the Attorney-General contends—that for instance the defendants in the action would not be at liberty to plead any immunity by reason of the Act, and would not be able to raise any claim by way of counterclaim as they might have done if these proceedings had been taken within the two years limited by the Act. That is true, but the same argument, of want of equity, might be raised in a hundred cases where the interests of the State are held to be superior to the interests of individual claimants. So far as the general principle is concerned, I am bound to say I feel no doubt that it entitles the Crown to the dismissal of this summons.

For the plaintiffs the argument was put upon the further ground that by the express terms of the Maritime Conventions Act it must be taken that the Crown is not within these provisions. Sect. 10 of the Act provides that the Act shall be construed as one with the Merchant Shipping Acts, 1894 to 1907. Sect. 741 of the Merchant Shipping Act, 1894, provides that: "This Act shall not, except where specially provided, apply to ships belonging to Her Majesty." Incorporating that section in the Act of 1911, there would be the very words for which Mr. Bucknill urged the necessity.

On both grounds the application of the defendants fails and it must be dismissed with costs.

Solicitor for the Lords Commissioners of the Admiralty: *The Treasury Solicitor.*

Solicitors for the defendants: *Ince, Colt, Ince & Roscoe.*

E. C. M. T.

ADMIRALTY.

1922
Feb. 21, 22;
April 6.

THE JOANNIS VATIS (No. 2).

Shipping—Collision Damages—Action in Rem—Bail in full Value of Ship—Seizure for Interest and Costs—Mode of Execution—Liability in Personam—Writ of fi. fa.

In an action in rem in respect of damage by collision the defendants gave bail in the sum of 100,000*l.* as representing the full value of their vessel and the limit of their liability according to French law. In the Admiralty Court both the plaintiffs' and the defendants' vessels were held to blame, but the Court of Appeal held the defendants' vessel alone to blame and this decision was upheld by the House of Lords.

The 100,000*l.* being insufficient to satisfy the plaintiffs' judgment, the plaintiffs, who admitted that qua damages they could not recover more than the 100,000*l.*, threatened to arrest the defendants' vessel in respect of interest and costs; and, under protest, the defendants provided bail in a further sum to avoid arrest:—

Held, (*a*) That interest on sums due in respect of collision damage was awarded by way of damages, and that accordingly the plaintiffs were not entitled to interest except for the period between the judgment of the Court of Appeal and the judgment of the House of Lords—309 days—in respect of which the defendants were liable for interest on the 100,000*l.* at 4 per cent.

(*b*) That the plaintiffs were entitled to costs and interest on costs at 4 per cent.

(*c*) That having received bail in the full value of the defendants' vessel, the plaintiffs could not arrest her in rem, but could proceed in personam and were entitled to a declaration that the amounts due in respect of interest and costs were enforceable by seizure and sale of the vessel by a sheriff under a writ of fi. fa.

MOTION by the plaintiffs in a damage action in rem for a declaratory judgment (*a*) that they were entitled to certain sums by way of interest and costs in addition to a sum of 100,000*l.*, representing the full value of the defendants' vessel and the limit of the defendants' liability according to French law, provided as bail; and (*b*) that the defendants' vessel was amenable to seizure and arrest by the Marshal in respect of the said sums.

The plaintiffs were the owners of the British steamship *Worsley Hall*, a vessel of 3489 tons gross; the defendants were the owners of the Greek steamship *Joannis Vatis*, a vessel of 3702 tons gross.

1922

THE JOANNIS VATIS (No. 2).

The facts are fully set out in the judgments, and will also be found in the report (on another point) ante, p. 92.

Butler Aspinall K.C. and *Alfred T. Bucknill* for the plaintiffs. The amount recoverable by the plaintiffs is not limited to the bail. Apart from any question of limitation of liability, but for the agreement as to the provision of the sum of 100,000*l.*, which represented the limit of the defendants' liability according to French law, the plaintiffs could have proceeded against the defendants in personam for the balance of their judgment debt: *The Gemma* (1); *The Dictator* (2); *The Dupleix.* (3) The trend of modern cases is entirely contrary to the views of the late Sir Gainsford Bruce set out in Williams and Bruce's Admiralty Practice, 3rd ed., p. 305. The provision of bail merely deprives the plaintiffs of their maritime lien, it does not reduce the debt, and the *Joannis Vatis* having come within the jurisdiction, the plaintiffs are entitled to seize her in respect of the matters outside the agreement—namely, interest, the unpaid costs, and interest on costs. The facts in the present case are very similar to those in *The Freedom* (4) where bail had been provided in the sum of 500*l.* and the vessel was arrested by the Marshal for the balance of unpaid costs: see also *The Temiscouata* (5); *The Wild Ranger* (6), and the unreported decision of Deane J. in *The Lorena* (7) referred to in Roscoe's Admiralty Practice, 4th ed., p. 340, where the Court allowed the rearrest of a vessel in respect of unpaid costs after the amount of the claim had been paid into Court. The plaintiffs are entitled to an order directing the Marshal to arrest the *Joannis Vatis* or to a declaration that the vessel is subject to seizure by a sheriff under a writ of fi. fa. As regards interest, the plaintiffs' claim is for interest from the time they became entitled to damages—i.e., from the date of the judgment of the Court of Appeal. The practice in the registry is to allow interest at 5 per cent.

(1) [1899] P. 285.
(2) [1892] P. 304.
(3) [1912] P. 8.
(4) (1871) L. R. 3 A. & E. 495.
(5) (1855) 2 Spinks, 208.
(6) (1863) Br. & Lush. 84.
(7) (1906) Unreported.

1922

THE JOANNIS VATIS (No. 2).

[Reference was made to *The Gertrude*. (1)]

Bateson K.C. and *Noad* for the defendants. The agreement between the respective shipowners was not an ordinary agreement for bail, it was a reciprocal agreement for limitation of liability on the continental system—100,000*l.* or the value of the ship—a much larger sum than was obtainable under the English system of limitation based on the tonnage of the vessels. The plaintiffs are now seeking to obtain the benefit of both systems—the foreign limit plus interest and costs as allowed under the English system. The 100,000*l.* is the limit of the defendants' liability. Bail is only liable to the value of the ship and freight and not for the full amount of the damage done even where bail has been given beyond the value of the ship and freight: *The Duchesse de Brabant* (2); and the opinion of the authors of the 3rd ed. of Williams and Bruce's Admiralty Practice at p. 305, to the effect that the decision in *The Gemma* (3) has not altered the law in this respect, is correct. The bail in the sum of 100,000*l.* freed the *Joannis Vatis* from arrest and expunged the maritime lien. Therefore, even if any further sums were due in respect of interest or costs, the plaintiffs could not arrest the vessel, they could only levy execution under a writ of fi. fa. In none of the cases cited on behalf of the plaintiffs was the Marshal directed to arrest the ship where her full value had been given as bail and none of the cases deal with interest. If the plaintiffs were right in *The Gemma* (3) the ship could have been rearrested in respect of the costs, but she was not rearrested, she was seized by the sheriff. Further, although it appears that bail in the full value had been given in *The Gemma* (3) it is not stated what was the limit of liability under the Merchant Shipping Act, it may well have been more than the value of the ship, as was the case in *The Dupleix*. (4) In *The Freedom* (5), relied on by the plaintiffs, the bail was for considerably less than the value of the ship. It is not disputed that where there is no limitation defendants

(1) (1888) 13 P. D. 105.
(2) (1857) Swa. 264.
(3) [1899] P. 285.
(4) [1912] P. 8.
(5) L. R. 3 A. & E. 495.

1922

THE JOANNIS VATIS (No. 2).

who have appeared to the writ are liable beyond the bail to the full amount of the damages, but in the present case the bail was intended by both parties to be the limit of their respective liabilities, and the defendants, who are foreigners, are not liable to have their vessel seized even by the sheriff under a writ of fi. fa. which in effect amounts to a fresh proceeding. The plaintiffs admit that they cannot recover damages beyond the amount of 100,000*l.*; and the claim for interest is really a claim for further damages as the practice in the registry is to award interest as damages.

Butler Aspinall K.C. replied.

Cur. adv. vult.

April 6. THE PRESIDENT (SIR HENRY DUKE) read the following judgment: This is a motion in a damage action in rem made on behalf of the plaintiffs with a view to enforcement of a judgment for damages and costs which the plaintiffs obtained four years ago against the defendants. The questions which arise have their origin in the fact that the amount of the judgment in rem greatly exceeds the value of the defendants' ship and that the plaintiffs now claim process of execution against the vessel, as being now the property of the defendants, in order to recover certain unsatisfied items of their judgment debt. There are peculiar circumstances in the case which led in the course of the argument before me to a close examination of the conditions necessary to be established in order to entitle a plaintiff in rem in the Admiralty jurisdiction to maintain against the defendant in the action, in addition to his claims in rem, claims in personam.

The plaintiffs brought their action as owners of an English steamship, the *Worsley Hall*, and the cargo which was laden in her, on a voyage in the Mediterranean in August, 1917, in the course of which she came into collision with the *Joannis Vatis*, a Greek steamship, whose owners under the usual collective description were made defendants in the action. The action was brought in this jurisdiction as the result of correspondence between the solicitors for the parties

carried on while both ships were within the jurisdiction of French Courts in the port of Bizerta. Each party was threatening arrest of the ship of the other, and there was controversy as to the power of the plaintiffs to arrest the *Joannis Vatis*, the limits of the liability for damage, and the amount for which bail might be exacted. In the event the parties agreed upon—to quote the words they themselves used—"the exchange of unconditional undertakings for bail up to 100,000*l.*, provided that if the present value of either steamer upon valuation by approved valuer be less than above amount the bail for such steamer shall be the amount of such valuation." The reference to unconditional undertaking arose out of a dispute as to whether the *Joannis Vatis*, as a requisitioned ship, was subject to arrest. The agreement as to amount and reservation of a right to reduce the bail from the named maximum to the amount of ascertained values was no doubt referable to the fact that at Bizerta the actual values of the vessels would have determined the amount of the security possible to be enforced. No valuation appears to have been made by either party. It was a condition of the agreement as to bail that the liability of the parties should be determined here. The plaintiffs, the owners of the *Worsley Hall* and her cargo, accordingly issued their writ in this Court in the usual form and against the defendants under the usual style in an action in rem. The defendants so impleaded duly appeared and the litigation proceeded upon claim and counterclaim on the ordinary footing of proceedings in an action in rem. In proper course the defendants provided a bail bond whereby their bondsmen consented that "if the defendants, the owners of the *Joannis Vatis*, shall not pay what may be adjudged against them in the said action with costs, execution may issue forthwith against us, our heirs, executors and administrators, goods and chattels for a sum not exceeding one hundred thousand pounds."

At the trial of the action on October 25, 1918, both parties were held to blame, and there was the usual reference as to damages with no order as to costs. On appeal the plaintiffs

1922

THE JOANNIS VATIS (No. 2).

The President.

were successful. On February 18, 1919, the Court of Appeal pronounced the collision to have been occasioned solely by fault or default on the part of the *Joannis Vatis* and for the plaintiffs' claim for damages in consequence thereof, condemned the defendants in the said damages and in costs as well in the Court below as on the appeal, and referred the damage to the registrar assisted by merchants to assess the amount thereof. In the House of Lords on December 19, 1919, the judgment of the Court of Appeal was affirmed with costs.

Pending the reference it apparently became known to the defendants' advisers that the claims in respect of the *Worsley Hall* and her cargo exceeded the 100,000*l.* secured by the defendants' bail. The defendants accordingly took no part in the proceedings before the registrar and merchants. The damages were there ascertained at 146,953*l.* The 100,000*l.* secured by bail the defendants have paid. They have not paid the costs in this Court and the Court of Appeal. The plaintiffs at the hearing before me intimated that they do not claim as damages more than the 100,000*l.* they have received. They claim, however, a sum for interest on their judgment debt, costs, and interest on costs, and they have estimated their total claim at between 15,000*l.* and 16,000*l.*

On January 25, 1922, the *Joannis Vatis* was about to come within the jurisdiction, and the plaintiffs notified the defendants that in default of an undertaking by them to pay the unpaid costs of the cause the plaintiffs would arrest the vessel on her arrival in an English port. The defendants under protest undertook to find sureties for 2500*l.* in respect of any liability of theirs for the costs. The plaintiffs then gave further notice of their claim for interest and stated that they would issue execution for such interest unless the defendants should forthwith furnish security for the same. Plaintiffs' solicitors added this: "Our principals wish us to point out that they are in a position to issue execution for the damages remaining unpaid, but they agree that your clients should be entitled to limit liability upon payment of 100,000*l.* with interest at 5% from the date of the collision."

Bail for 15,600*l.* was provided by the defendants under protest and without prejudice to all questions.

The plaintiffs' contention before me was that the judgment recovered by them ought to be enforced by any process of execution which is at the disposal of the Court, and that arrest and sale under the jurisdiction in Admiralty and seizure and sale by the sheriff are complemental means of recovering payment of the debt established by the decree. The right to issue new process of execution after complete realisation of the res in the action in rem was based in the main upon the judgments of this Court in *The Freedom* (1) and *The Dictator* (2), and of the Court of Appeal in *The Gemma.* (3) Reliance was also placed on the judgment of Sir Samuel Evans P. in *The Dupleix* (4), where the principles laid down in *The Gemma* (3) were applied to a case closely resembling the present.

Counsel for the defendants disputed the applicability in this case of the decisions I have mentioned, and claimed to treat some important passages in the judgments as not being of binding authority. They adopted an argument from a standard work on Admiralty practice—Williams and Bruce's Admiralty Practice, 3rd ed., p. 305—in terms which I will cite therefrom: "It is submitted that an appearance in an action in rem, which admittedly is entered to prevent judgment being given in the absence of the defendant, does not alter the nature of the action or enlarge the relief to which the plaintiff would have been entitled if there had been no appearance, and that any dicta to the contrary in the case of *The Gemma* (3), where the actual decision was merely that the registrar's report in the action—confirmed by the Admiralty Division without objection—was conclusive as to the amount for which execution could be levied, are not such as to preclude the defendant in an action in rem, where bail has been given in the full value of the property proceeded against, from obtaining a reduction of the damages claimed in the action to the amount of the bail and costs, provided proper application be made either at the reference . . . .

(1) L. R. 3 A. & E. 495.
(2) [1892] P. 304.
(3) [1899] P. 285.
(4) [1912] P. 8.

1922

THE JOANNIS VATIS (No. 2).

The President.

before the registrar, or to the Court on objection to the registrar's report." The opinion set forth in the passage I have cited, assuming it to be that of Sir Gainsford Bruce, a learned judge who was very conversant with the jurisdiction in Admiralty, commands as of course my respectful attention, and I have taken it into account in considering the judgment which it purports to explain or define.

The first answer of the defendants to the claim of the plaintiffs was founded on the agreement of the parties as to bail. The limit of the liability of the defendants under French law being the value of their vessel, and the English statutory limit a less sum, the defendants contended that in its true effect the agreement before action precluded the plaintiffs from any larger claim than for 100,000*l.* This sum, they urged, was not only the sole subject of a contest in which no additional claim could be introduced; it was also the equivalent of a fund paid into Court under decree in an action for limitation of liability. In the correspondence from which the agreement between the parties is to be deduced neither party proposed in express terms a limitation of liability which should operate generally: though the defendants' solicitors wrote with regard to the proposed amount of bail: "We think the figure should cover either side's claim." The plaintiffs apparently were not aware at the outset that all claims of cargo owners were included in this action, and it seems that until a late period both sides thought the total claims against the *Joannis Vatis* or her owners would be substantially less than in fact they proved to be. I am satisfied, however, of the intention of both parties that the provision of bail for each ship in 100,000*l.* should place the ship in the same position as though her full value had been brought into Court. The agreement, however, while it excludes any claim in personam or in rem for damages beyond 100,000*l.*, does not appear to me to have any operation with regard to the plaintiffs' claims for interest and for costs. The right to these depends on considerations not governed by the agreement.

The second principal contention of the defendants was that

the enforcement by the plaintiffs of their remedies in rem is a bar to further proceedings. This argument I have considered, though I think it inconsistent with the principles laid down in *The Gemma*. (1) It was founded in the main on a class of decisions in the Court of Admiralty of which those most favourable to the defendants are, perhaps, *The Hope* (2); *The Volant* (3); *The Kalamazoo* (4); and *The Duchesse de Brabant*. (5) In *The Hope* (2) judgment in personam for damages in excess of the proceeds of the ship was refused. Dr. Lushington stated in general terms in *The Volant* (3) that in an action in rem the Court could do no more than sell the ship for the benefit of the plaintiffs. In *The Kalamazoo* (4) the same learned judge held that a second arrest in respect of the same damage could not be sustained, and declared that the Court cannot "engraft a personal action on an action in rem." Bail had been taken there for 3500*l*., the damages proved to be 4010*l*.; a second action in rem was brought, and Dr. Lushington decided that no such action could be maintained. "It would be perfectly absurd," he said, "to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and when a ship is once released on bail she is altogether released from that action." Read as a declaration of principle the observations of Dr. Lushington in *The Kalamazoo* (4) appear to support the contention of the defendants. To appreciate their true significance it is necessary, however, to see what must have happened in 1851 in *The Kalamazoo* (4) before the then plaintiffs could be said to have exhausted their legal remedies.

An action in rem carried to its conclusion did not preclude a subsequent action in personam, and a previous action in personam with judgment and execution would not have precluded a subsequent action in rem. For the latter proposition *The John and Mary* (6) and *The Bengal* (7) are authorities—both being decisions of Dr. Lushington. The

(1) [1899] P. 285.
(2) (1840) 1 W. Rob. 154.
(3) (1842) 1 W. Rob. 383.
(4) (1851) 15 Jur. 885.
(5) Swa. 264.
(6) (1859) Swa. 471.
(7) (1859) Swa. 468.

1922

THE JOANNIS VATIS (No. 2).

The President.

former proposition is made good by the decision of the Court of common pleas in *Nelson* v. *Couch* (1), that an Admiralty action in rem is no bar to a subsequent action in personam for the same cause, unless the proceeds of the vessel and freight are at least equal to the amount of the damage suffered. Willes J. said, with regard to cases like *The Kalamazoo* (2), "I think the rule of the Admiralty Court . . . . depends on forms peculiar to that Court, and not upon any principles of law which prevent a man recovering from the owner personally the excess of damage which the ship is insufficient to satisfy." The judgment of the Privy Council in *The Orient* (3) is an illustration of the principle laid down in the three cases I have last cited.

The authorities to which I have referred show that as between persons subject to the jurisdiction of the English Courts claims such as are now in question would before the Judicature Acts have been enforceable by successive actions in rem and in personam. Since the Judicature Acts these cumulative rights are enforceable in the High Court of Justice in one action. This I take to be a principal ground of the decision in *The Gemma*. (4)

The objection is made that the defendants, brought into the jurisdiction only by proceedings in rem, cannot with due regard to their rights as subjects of a foreign state be made amenable in what has become substantially a second action. *The Gemma* (4) and *The Dupleix* (5) are authorities to the contrary. In *The Gemma* (4), foreign owners of a foreign ship were under like circumstances held, in an action like the present where the ship had been bailed in its full value, liable to process of execution in respect of the amount by which the judgment recovered in the action exceeded the amount of the bail. As to any alleged hardship upon foreign defendants there is less pretence for complaint here than there was in *The Gemma*. (4) Before action the parties in this case agreed that the contest between them should be decided in

(1) (1863) 33 L. J. (C. P.) 46, 48.
(2) (1851) 15 Jur. 885.
(3) (1871) L. R. 3 P. C. 696.
(4) [1899] P. 285.
(5) [1912] P. 8.

this Court. I will only add that if any just ground existed for exempting the defendants from the jurisdiction, or for applying any exceptional rule of law in their favour, they might have appeared under protest to argue the question of jurisdiction, or have pleaded in the action any defence on which it is said they are entitled to rely.

I next proceed to determine what sums are due and unpaid under the plaintiffs' judgment and what process of execution is available to the plaintiffs. The claim of the plaintiffs for interest on their judgment debt, as it was pressed, is for 5 per cent. on 100,000*l.* since the date of the judgment in the Court of Appeal, which date it bears. Under the ordinary practice of the High Court a judgment debt carries interest from its date at 4 per cent. (1 & 2 Vict. c. 110, s. 17; R. S. C., Order XLII., r. 16). That the plaintiffs' damages had to be assessed before the judgment could be completed by the Court's confirmation of the assessment might—but I do not pause to determine whether it would—have been immaterial in an action in the King's Bench Division. Here two special matters are to be considered. In this jurisdiction a rule exists with regard to interest upon damages which is well established and proper to be taken into account. The registrar and merchants include in their computation of damage by collision interest upon the items of claim from the time of accrual of the damage until the date of the assessment. The practice was discussed and confirmed in *The Kong Magnus* (1), and is in conformity with what was said long since by Lord Stowell in *The Dundee.* (2) The sum so calculated is given not as interest on a debt but as part of the damages. During recent years interest as damages has been reckoned in this way at 5 per cent., which perhaps explains the plaintiffs' demand of a 5 per cent. rate in their claim. Not only is this practice material for consideration as to the date from which interest can be held to run. It is necessary to remember also that—as the plaintiffs concede—the damages payable by the defendants are limited to 100,000*l.* Interest upon items of damage down to the assessment

(1) [1891] P. 223. (2) (1827) 2 Hagg. Adm. 137, 143.

1922

THE JOANNIS VATIS (No. 2).

The President.

of the loss would have been recovered out of this amount if the total claims had not exceeded 100,000*l.* Really the claim is for damages. There was no allegation of default of payment by the defendants of the 100,000*l.* after that sum had been found to be due, and I have come to the conclusion that the only time in respect of which interest can properly be awarded is the period between the judgment of the Court of Appeal, February 17, 1919, and the judgment of the House of Lords, December 19, 1919. The defendants, by their appeal to the House of Lords, postponed the settlement of the claims of the plaintiffs by 309 days, and they must pay interest on 100,000*l.* at 4 per cent. for that time.

The claim of the plaintiffs to recover the costs of their action and interest thereon in addition to the amount for which bail was given, was admitted in the argument of the case for the defendants to stand on a different footing from the claim to recover interest upon the amount of the award in respect of damages. Having regard to the state of the authorities some such admission was inevitable. *The Dundee* (1), already mentioned, raised questions of the allowance of claims for interest on damages, and for costs and interest on costs, in a damage action where the Statute of Limitation (53 Geo. 3, c. 159) applied and the sums in question were outside the statutory limit and the amount of the bail. Lord Stowell held the plaintiff to be entitled to recover under both heads. "Beyond the limited liability," he said, "the claimant is entitled to remuneration for the costs to which he is driven for recovering his loss"; and he added that the statute would otherwise be chargeable with great injustice, and the immunity of the defendant would encourage "unjust and persevering litigation." The Court of Queen's Bench in *Ex parte Rayne* (2) decided in prohibition that, beyond the limit of liability by the statute, a defendant held liable for damages in a damage action in the Court of Admiralty might properly be monished to pay the costs, notwithstanding that he had been brought within the jurisdiction only by the arrest of his ship.

(1) (1827) 2 Hagg. Adm. 137, 143. (2) (1841) 1 Q. B. 982.

In 1842 in *The Volant* (1), and in 1863 in *The Europa* (2), Dr. Lushington applied the same rule, and in *The Freedom* (3) Sir Robert Phillimore said that the Court of Admiralty could always issue a monition for the payment of costs which have exceeded the amount in which the suit was instituted, and that he thought in that case that under the old law "if necessary, the Court would have ordered the rearrest of the ship" for the payment of the costs. Without considering whether the last observation I have cited is to be explained by the fact that *The Freedom* (3) was a case of a ship which had been bailed for less than her full value, it is enough to say that under the Admiralty practice before the Judicature Acts defendants in rem were liable personally for unpaid costs after the full value of the res had been recovered by the plaintiff. So also, at the present time, they are liable for costs in addition to the full amount payable for damages by collision under the limitation enacted in the Merchant Shipping Act, 1894, s. 503.

As to the costs of the reference to the registrar and merchants to assess the plaintiffs' damages, the defendants took no part in the proceedings and the only matters contested were those which arose between the plaintiff shipowners and the plaintiff cargo owners. The plaintiffs cannot recover the costs of this contest, but are I think entitled to be paid such costs as are payable by defendants in damage actions when the amount of the plaintiffs' claim is not disputed. Under the Rules of the Supreme Court the sums due by the defendants for costs due and unpaid bear interest at 4 per cent. from the respective dates on which they were decreed to be paid.

There remains to determine what process of execution is available to the plaintiffs as against the defendants. Under the Rules of the Supreme Court (Order XLII., r. 3) a judgment for recovery by or payment to any person of money may be enforced by any of the modes in which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred to the High Court by the Judicature Act of 1873

(1) 1 W. Rob. 383. (2) (1863) Br. & Lush. 210.
(3) L. R. 3 A. & E. 495.

1922

THE JOANNIS VATIS (No. 2).

The President.

might have been enforced at the time of the passing of that Act. The plaintiffs are not entitled to rearrest the *Joannis Vatis* unless they could have done so formerly by a warrant from the Court of Admiralty. On consideration of the authorities, including *The Dictator* (1), I am satisfied that after receiving the full value of the ship they have not in this case any right of rearrest. They must rely on process of execution in personam. What was claimed in default of a warrant to the Marshal was a writ of fi. fa., and the Admiralty Court Act, 1861, was relied upon. Such a writ was ordered to issue in *The Gemma* (2) and in other cases relied on by the plaintiffs, and it is warranted by the Rules of the Supreme Court. I do not think, though, that a writ of fi. fa. could be issued as of course in an action constituted as the present action is. Under the practice of the High Court as to the issue of such a writ there must be identification in the writ of the judgment debtor whose effects are to be seized. Special provision exists for the case of a partnership, but the defendants here are not sued as or shown in the proceedings to be a partnership. They are only described in the action as "the owners and parties interested in the s.s. *Joannis Vatis*." In order to ascertain whether this is more than a technical difficulty I have caused inquiry to be made of the parties through the registry, and have learned that the *Joannis Vatis* was, when bail was given in February last, still owned by the defendants who appeared to the plaintiffs' writ in 1917. This being so, the plaintiffs are entitled to a declaration that the amounts I have already indicated remain due to them on their judgment and that the same were at the date when bail was given by the defendants and now are enforceable by seizure and sale of the *Joannis Vatis* by a sheriff under a writ of fi. fa.

Solicitors for the plaintiffs: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the defendants: *William A. Crump & Son.*

(1) [1892] P. 304. (2) [1899] P. 285.

E. C. M. T.

DIVORCE.

1922
April 27.

LISTER *v.* LISTER.

Divorce—Practice—Deed of Separation—Covenant not to institute Proceedings—Proviso that Covenants should be void if Parties were judicially separated on the Ground of Misconduct by either after the Date of Deed—Wife's Petition for Dissolution—Husband's Cruelty before Deed and Adultery after it proved—Wife's Right to Decree without previous judicial Separation.

By a deed of separation the wife covenanted not to take proceedings in respect of prior offences, but the deed contained a proviso that the covenants should be void if the parties should be judicially separated on the ground of the subsequent misconduct of either. After the date of the deed the wife brought a petition for divorce and proved that the husband had committed adultery after, and cruelty before, the date of the deed:—

Held, that the wife was entitled to a divorce without first obtaining a decree for judicial separation.

Bourne v. *Bourne* [1913] P. 164 and *Thompson* v. *Thompson* [1916] P. 165 followed.

Lipman v. *Lipman* [1916] P. 25 not followed.

WIFE'S petition for divorce on the ground of her husband's cruelty and adultery.

The cruelty complained of, and proved, was committed before April 16, 1921, on which date a deed of separation was executed by both parties, containing the following covenant and proviso: "No proceedings shall be taken by or on behalf of the said George Thomas Lister or Susie Lister against the other of them in respect of any misconduct or alleged misconduct previous to the date of these presents and any offence which may have been committed or permitted by either of them against the other is hereby condoned." "Provided that if the said parties shall at any time come together and cohabit with each other or if their marriage shall be dissolved or they shall be judicially separated by reason of any misconduct of either of them occurring after the date hereof then and in such case all the covenants and provisions herein contained shall become void."

Evidence was given of the cruelty before the date of the deed and of the husband's adultery afterwards.

1922

LISTER v. LISTER.

G. C. Tyndale for the petitioner. There is a conflict of authority as to the powers of the Court under the circumstances. In *Bourne* v. *Bourne* (1) Sir Samuel Evans P. held that as the petitioner was clearly entitled to a judicial separation, and when that was granted would be entitled to a divorce, a divorce could be granted without requiring the petitioner to obtain a judicial separation first. In *Lipman* v. *Lipman* (2) your Lordship held that the petitioner could not be relieved from her covenant until a judicial separation was granted. But in *Thompson* v. *Thompson* (3) Shearman J. followed *Bourne* v. *Bourne*. (1)

The case was not defended.

HORRIDGE J. For the sake of uniformity of decision I shall follow the opinions of Sir Samuel Evans and Shearman J. I find the respondent's cruelty and adultery proved, and the petitioner must have a decree nisi with costs.

Solicitors for petitioner: *Raphael, Zeffertt & Co.*

(1) [1913] P. 164. (2) [1916] P. 25.
(3) [1916] P. 165.

J. R. B.

DIVORCE.

1922
May 2.

BOULTON *v.* BOULTON.

Divorce—Practice—Desertion—Order by Court of Summary Jurisdiction for Maintenance of Wife on the Ground of the Husband's Desertion—Provision for Non-cohabitation—Amendment of Order by Court of Summary Jurisdiction—Effect on the Running of Time for Desertion—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 5.

The insertion in an order for maintenance of the wife under the Summary Jurisdiction (Married Women) Act, 1895, of the provision that the wife should be no longer bound to cohabit with her husband, referred to in s. 5, puts an end to the husband's desertion and prevents the time from running so as to make up the two years' desertion which coupled with adultery entitles the wife to a divorce. But it is competent for the wife by subsequent application to the Court of Summary Jurisdiction to obtain the amendment of the order by striking out the provision; and after that amendment the period of desertion necessary for divorce will run again.

WIFE's petition for dissolution of marriage on the ground of her husband's desertion and adultery.

The marriage took place in 1915. In July, 1916, the wife obtained from a Court of Summary Jurisdiction an order for maintenance on the ground of her husband's desertion. This order contained the provision that the applicant should not be bound to cohabit with her husband, which, notwithstanding the judgments of the Court of Appeal in *Harriman* v. *Harriman* (1), seems to be often inserted as common form. In April, 1919, on the application of the wife, the same Court of Summary Jurisdiction amended their order of July, 1916, by striking out the non-cohabitation provision. This amendment was made in the presence of the husband, who was served personally with the amended order. The husband had not returned to his wife. In July, 1921, the wife presented this petition. The case was undefended. The adultery and desertion were proved to the satisfaction of the Court.

J. A. C. Skinner for the petition. The petitioner is entitled to the relief asked. *Harriman* v. *Harriman* (1) decided

(1) [1909] P. 123.

1922

BOULTON v. BOULTON.

that the order of the Court of Summary Jurisdiction containing the provision for non-cohabitation was, so long as it was in force, a bar to the charge of desertion; but in this case the objection has been removed by the striking out of that provision. On its being struck out the time of desertion continued to run, or in any case a new time began to run, and two whole years have elapsed since the provision was struck out.

HORRIDGE J. granted the usual decree nisi, with costs.

Solicitors: *T. H. Horwood & Co.*

J. R. B.

1922

March 20, 27; *May* 10.

DIVORCE.

GARRATT *v.* GARRATT AND GARRATT.

Divorce—Order for varying Settlement under the Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Bequest by Will of Petitioner's Father to Trustees of Marriage Settlement upon Trusts thereof—Jurisdiction of Court—Meaning of "Settlement."*

The power of the Court under s. 5 of the Matrimonial Causes Act, 1859, to vary the trusts of a marriage settlement, does not enable it to vary the trusts of a will, even when the gift by will is to the trustees of a marriage settlement upon the trusts of the settlement.

THE following statement of facts is taken from the judgment of Hill J.

The petitioner obtained a decree of dissolution of marriage on July 30, 1907, which decree was made absolute on February 2, 1908. By a deed of settlement, dated July 7, 1890, made in contemplation of the marriage, the petitioner's father had covenanted that his executors and administrators should pay the trustees 5000*l.* within six months after his death, to be held upon the trusts of the settlement which included a life interest in the wife if she survived the husband. By his will, dated July 17, 1903, the petitioner's father, after reciting this covenant, bequeathed "to the trustees of the settlement the further sum of 5000*l.* to be held by them

upon the same trusts as are therein declared concerning the said sum of 5000*l.* so covenanted to be paid by me as aforesaid." Petitioner's father died on July 11, 1908, nearly a year after the decree nisi, and five months after the decree absolute. He had not altered his will. Subsequently both sums of 5000*l.* were paid by his executors to the trustees of the marriage settlement. Meantime, on February 28, 1908, the petitioner delivered a petition for variation of the settlement, praying an order that the Indenture of Settlement be varied by directing that the wife's interest in the husband's trust funds be extinguished as if she were dead. To that petition the wife did not appear. The registrar made his report on July 22, 1908, as follows. He recited the settlement and recommended: "Having heard the Solicitor for the petitioner and read affidavits of service of the petition for Variation of Settlements upon the respondent and the trustees of the said Settlement in England and the trustees out of the Jurisdiction having intimated that they have no objection It is submitted that the Court should order that from and after the date of such Order all the powers and interests of the said respondent in the husband's trust funds be extinguished as if she were dead." On July 23, 1908, the petitioner's solicitor became aware of the provisions of the will of the petitioner's father and mentioned the matter to the registrar, who directed that the facts should be brought to the notice of the judge on the motion to confirm the report. That motion was made by Mr. Newton Crane on behalf of the petitioner before Bargrave Deane J. on October 19, 1908. Neither the wife nor the trustees of the marriage settlement appeared. It appears by an affidavit of Mr. Newton Crane, and the indorsement of his brief, that he mentioned the facts to the judge and asked that the two sums of 5000*l.* should be dealt with as if the second, as well as the first, had been mentioned in the report. The judge assented and confirmed the report, expressly stating that the respondent's interest in the sums of money brought into settlement by the petitioner's father should be extinguished. The order as drawn up was: "That the said report be confirmed." Both

1922

GARRATT v. GARRATT AND GARRATT.

sums of 5000*l.* were transferred to the trustees of the settlement, who paid the interest on both to the husband until January 23, 1920, when the husband executed an assignment of a part of the funds representing the two sums of 5000*l.* to his son, the only child of the marriage. The trustees then raised the question whether the interest of the wife in the additional sum of 5000*l.*, bequeathed to the trustees by the petitioner's father's will, had been extinguished by the order. A summons was taken out in the Chancery Division for the determination of this question, and came before P. O. Lawrence J., who ordered it to stand over, and suggested an application to this Court to decide whether the order was intended to, and did in fact, extinguish the interests of the wife in both sums of 5000*l.*

Clifford Mortimer for the motion. The petitioner is not asking the Court to vary the order Bargrave Deane J. made, but to correct a mistake in the drawing up of the order. The order as drawn is clearly inaccurate, for it extinguishes all the interests of the respondent in the husband's trust funds, but the husband brought nothing into the settlement. The order must therefore refer to the money brought into settlement by the husband's father; and the affidavit of Mr. Newton Crane shows that it was intended to include the additional sum brought in by the father as well as that he had covenanted to pay. The father's will did not create a fresh settlement, but gave both sums to the trustees of the existing marriage settlement to hold upon the trusts thereof. The Court had, therefore, jurisdiction to deal with the fund: *Paul* v. *Paul and Farquhar* (1); *March* v. *March and Palumbo* (2); *Worsley* v. *Worsley and Wignall.* (3)

W. M. Hunt for the respondent. There is nothing to show that any mistake was made in drawing up the order. And in any case this Court must consider what jurisdiction the Court had to make the proposed order. The original application was under the Matrimonial Causes Act, 1859,

(1) (1870) L. R. 2 P. & M. 93. (2) (1867) L. R. 1 P. & M. 440.
(3) (1869) L. R. 1 P. & M. 648.

s. 5, and the decision of the Court of Appeal in *Loraine* v. *Loraine and Murphy* (1) shows that the Court has under that section only power to alter the trusts of an ante-nuptial or post-nuptial settlement, not those of the will of a father of either party to the marriage. Here the second 5000*l.* was settled by the will, the reference to the trusts of the settlement has merely the same effect as if those trusts were repeated in the will.

He also referred to *In re North.* (2)

Clifford Mortimer in reply. The case of *Loraine* v. *Loraine and Murphy* (1) was decided under s. 45 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which is throughout the judgments carefully distinguished from s. 5 of the Matrimonial Causes Act, 1859.

Cur. adv. vult.

May 10. HILL J. [after stating the facts as above, proceeded:] A question having arisen in the Chancery Court as to whether the wife's interest had been extinguished in the second 5000*l.*, the sum bequeathed by the petitioner's father to the trustees of the marriage settlement to be held by them upon the same trusts as the first 5000*l.*, the petitioner by the present notice of motion, filed March 14, 1922, asks this Court (1.) to declare that by the order of October 18, 1908, the wife's interest in the second 5000*l.* was extinguished; and (2.) that the order of October 19, 1908, be amended by adding words which will have that effect.

My difficulty in the case has been to see whether, whatever my own view, I am not bound to carry out what seems to have been intended by Bargrave Deane J., express the order as he seems to have intended, and leave petitioner to go to the Court of Appeal. Bargrave Deane J.'s mind seems not to have been directed either to the fact that neither wife nor trustees had appeared, and that the petition for variation was absolutely silent as to the second 5000*l.*, nor to the question whether the Court had power to vary a settlement created by will, and the observations of Kay L.J. on that

(1) [1912] P. 222. (2) (1897) 76 L. T. 186.

1922

GARRATT v. GARRATT AND GARRATT.

Hill J.

question in *Midwinter* v. *Midwinter*. (1) I have the advantage, which Bargrave Deane J. had not, of the decision of the Court of Appeal in *Loraine* v. *Loraine and Murphy* (2), which makes it quite clear that this Court has no power to vary the trusts of a will. That case turned on s. 45 of the Matrimonial Causes Act, 1857, but the judgments deal also with s. 5 of the Matrimonial Causes Act, 1859, and in part proceed upon what the Lords Justices regarded as the clear effect of s. 5—namely, that it related to ante-nuptial or post-nuptial settlements only and to nothing else.

In the present case the interest of the parties in the second 5000*l.* is created by the will and not by any marriage settlement; if anything further were needed it is created by the will of a testator who died after the marriage had been dissolved.

I have no doubt that this Court could not make the order which the petitioner says Bargrave Deane J. intended to make. The report as confirmed in terms deals only with the first 5000*l.* Petitioner must ask me to vary the order as drawn up. That seems to me to make the question one upon which I can act, notwithstanding Bargrave Deane J.'s contrary intention. I refuse to add anything to the order. It correctly confirms the report which dealt with the only matters which the Court had jurisdiction to control.

Motion dismissed with costs.

Solicitor for all parties: *A. T. Plant.*

(1) [1892] P. 28, 38.

(2) [1912] P. 222.

J. R. B.

PROBATE.

1922
May 8, 11.

In re McLAUGHLIN (Deceased).

Probate—Practice—Resealing Colonial Grant of Probate—Original Grant to a Corporation having its principal Place of Business in a Colony—Colonial Probates Act, 1892 (55 *Vict. c.* 6), *s.* 2—*Administration of Justice Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 81), *s.* 17.

Although the power given to the High Court by the Administration of Justice Act, 1920, to grant probate to a corporation named as executor of a will applies only to a corporation which has its principal place of business in the United Kingdom, the Court will, in exercise of the discretion given to it by s. 2 of the Colonial Probates Act, 1892, reseal a grant of probate made by a Colonial Court, having jurisdiction, to a corporation having its principal place of business in a Colony.

Robert McLaughlin died in November, 1921, domiciled in Ontario in the Dominion of Canada, having made a will whereby he appointed the National Trust Co., Ld., of Toronto, a corporation having its principal place of business in Toronto, and Mrs. Elizabeth Ann Owens, executors. On January 6, 1922, probate of this will was granted by the Surrogate Court of Ontario to the corporation and Mrs. E. A. Owens.

The deceased left assets in England, and the usual application for resealing this probate, under the Colonial Probates Act, 1892, was made to the Principal Probate Registry; but the Registrar refused the grant on the ground that it was not according to the practice of the English Court to grant probate to a corporation which had not its principal office in the United Kingdom; and that a circular had been issued to the office by the authority of the President that no grant made to a person or corporation incompetent to take a grant in this country should be sent forward for resealing without special direction.

The executors now moved for an order that the probate should be resealed.

Clifford Mortimer for the executors. The general principle as to resealing foreign probates, is that the Court will follow the law of the domicil of the deceased, and will reseal the

1922

McLAUGHLIN, *In re.*

probate granted by the foreign Court to the persons entitled thereto by the law of the domicil, though they would not be entitled to probate according to the law of England: *In the Goods of Earl* (1); *In the Goods of Meatyard.* (2) The only exception is when the person to whom the foreign grant is made is by the English law incapable of taking a grant, as, for example, a minor.

In *In the Estate of Rankine* (3) the Court resealed a grant of probate made by a Scotch Court to a corporation, though at that time the English Court could not grant probate to a corporation. That difficulty is got rid of by the Administration of Justice Act, 1920, s. 17, which enables the Court to grant probate to a corporation. It is true that in order to be entitled to an original grant the corporation must have its principal place of business in the United Kingdom; but that limitation cannot apply to the case of resealing a colonial grant.

He also referred to *In the Goods of Smith.* (4)

HILL J. [after stating the facts as above]. The question is whether this Court should allow the resealing here of that grant of probate.

I have been referred to cases like *In the Goods of Earl* (1), which are not strictly in point. The present application is not for a grant of administration, with or without a will annexed, to persons entitled to administer under the grant of a Court of the testator's domicil. It is for the sealing of a grant of probate. If the sealing is allowed here under s. 2 of the Colonial Probates Act, 1892, then by force of that section the probate will be of the like force and effect, and have the same operation as if granted by the Court here.

The difficulty felt in the Registry is that it is contrary to the practice of this Court to seal here a grant of probate, made by a Court in the British possessions to which the Colonial Probates Act, 1892, has been applied, in cases where the grantee is a person to whom the original grant would

(1) (1867) L. R. 1 P. & M. 450.
(2) [1903] P. 125.
(3) [1918] P. 134.
(4) [1904] P. 114.

not be made here. Apart from the provisions of the Administration of Justice Act, 1920, s. 17, a grant of probate would not be made here to a corporation, and that section applies only to corporations "having their principal place of business in the United Kingdom," and, therefore, does not apply to the present case.

But whatever objection in principle there may have been to a grant of probate to a corporation, Parliament has, by the Administration of Justice Act, 1920, overruled it in regard to corporations having their principal place of business in the United Kingdom. Parliament went even further in regard to sealing here of grants made in Scotland, by the Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56), for in cases within s. 12 of that Act, the sealing here is made obligatory, as is shown by *In the Estate of Rankine.* (1)

Sect. 2 of the Colonial Probates Act, 1892, gives a discretion to the Court. In my view it will simplify business and do no injury if I am guided by similar considerations to those pointed out in *In the Goods of Earl* (2), and if I recognize that the law does not object to corporation executors per se, instead of requiring the National Trust Co., Ld., to appoint a syndic, and then making a grant of administration with the will annexed. I shall permit the sealing here of the probate granted in Ontario.

The rules appear to me to provide for all the steps which ought to be taken in regard to such sealing, and no special directions are necessary; but if they are the matter can be mentioned again.

Solicitors: *Ince, Colt, Ince & Roscoe.*

(1) [1918] P. 134.

(2) L. R. 1 P. & M. 450.

J. R. R.

1921
Oct. 19.

DIVORCE.

MANN *v.* MANN.

Restitution of Conjugal Rights—Sincerity of Applicant—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 17, 22—*Matrimonial Causes Act*, 1884 (47 & 48 *Vict. c.* 68), *s.* 5.

In a wife's suit for restitution of conjugal rights, where the original separation of the parties has been by mutual consent, as under a deed of separation, the Court will require evidence that the applicant sincerely desires that her husband should return to cohabitation. Without this the power given by the Act of 1884 would tend to create an artificial state of desertion.

WIFE'S petition for restitution of conjugal rights.

The parties were married in England in 1904. There were two children of the marriage. Differences arose between the parties and in consequence the wife left her husband, and in March, 1913, he obtained a decree for restitution of conjugal rights. The wife obeyed the decree, but in July of the same year they again separated, and on August 1 executed a deed of separation. This deed contained mutual covenants not to sue for restitution of conjugal rights, a covenant by the husband to pay the wife 25*l.* a week, and a proviso that her right to such payment should cease if she should sue for restitution. The payments were made and the parties lived separately until March, 1921, when the wife wrote to the husband asking him to return for the sake of the children and their education, and secure for them a safe and happy future. On March 23 the husband answered by a definite refusal to return.

Victor Russell, for the petitioner, cited *Williams* v. *Williams*. (1)

The case was undefended.

On evidence of these facts being given, Sir Henry Duke P. said that he must have some further explanation before granting a decree. He said that in *Williams* v. *Williams* (1) he had followed other decisions in holding that a deed of

(1) [1921] P. 131.

separation was not a bar to a suit for restitution unless the respondent set it up, but, as he had there stated, he must be satisfied of the sincerity of the petitioner's request. He must know what led to the petitioner's letter of March 2, 1921.

The petitioner was then recalled, and stated that under the terms of the deed the children spent a considerable part of each year with their father; that she had learned through them of certain matters which she thought undesirable for them, and which she hoped would cease if cohabitation were resumed; and that with that object, and in their interest, she was sincerely desirous that her husband should return to her.

THE PRESIDENT (SIR HENRY DUKE). The Matrimonial Causes Act of 1884 made non-compliance with a decree of restitution equivalent to desertion for two years. This artificial species of desertion lends itself easily to arrangement between the parties, and there is much ground for suspicion that parties avail themselves of this procedure to bring about a fictitious appearance of desertion. The Court, however, proceeds not upon pretence but upon facts. It is not desirable to create a new and artificial state of desertion. In the present case, therefore, when it appeared in the course of the hearing that the separation had been by agreement, it was necessary, although the husband did not defend the suit, to ascertain whether there was a sincere desire on the part of the wife to obtain the relief she was asking—namely, a resumption of cohabitation. After hearing the wife's explanation, I am satisfied that she did desire it.

There will accordingly be a decree of restitution of conjugal rights to be obeyed within fourteen days, with costs.

Solicitors: *Charles Russell & Co.*

J. R. B

1922
May 30.

PROBATE.

In re ADAMS.

BENTON *v.* POWELL.

Probate—Lost Will—Evidence—Declaration of deceased Person against proprietary Interest—Presumption that Person in Possession of Real Property is Owner—Declaration of such Person that he had destroyed Will giving him a Life Interest after the Testatrix's Death—Evidence to rebut Presumption not admitted.

A widower, who was in possession of real property belonging to his deceased wife's estate, declared that he had destroyed her will after her death. The will had given him a life interest in all his wife's property:—

Held, that the declaration was admissible in evidence on the ground that it was prima facie against his interest because of the legal presumption that being in possession he was owner in fee; and the Court could not admit evidence to rebut that presumption by showing that in fact he had no interest in the property except under the will.

FRANCES ADAMS, the testatrix in this case, made a will dated October 22, 1907, by which she appointed her great-nephew, Oscar Robert Benton, executor and trustee, and gave all her real and personal estate to her husband for his life and after his death to her trustee upon trust to sell and divide the proceeds between certain named persons.

She died on June 27, 1919. Up to her death she had lived with her husband in a freehold house belonging to her, and she also owned certain cottages. After her death her husband continued to live in the same house. The executor searched the house for papers and found an empty envelope indorsed "Will of Mrs. Frances Adams," but no will could be found; he asked what had become of the will and the husband answered "I destroyed it"; the executor asked when, and the husband answered "After your aunt's death."

The husband died on January 13, 1920.

The executor brought this action to establish the will, making the heir at law and one of the next of kin defendants. The heir at law put the plaintiff to proof of the will. The next of kin put in no defence. The contents and execution of

the will were proved by a clerk to the firm of solicitors who prepared it. He was one of the witnesses to and produced a completed draft of the will.

The only question at the hearing was whether the declaration of the deceased husband could be received as a declaration contrary to his interest.

Blanco White for the plaintiff tendered the declaration.

Clifford Mortimer (*T. Bucknill* with him) for the defendant, the heir at law. This declaration is not admissible. I admit that where a person is in possession of real estate there is a presumption that he is owner in fee, and, therefore, a declaration that he has a less estate is presumed to be against his interest: *Sly* v. *Sly*. (1) But when there is other evidence as to what the interest of the speaker was, the presumption no longer applies. Here there is evidence that Adams had no interest except under his wife's will. A declaration, therefore, which enabled that will to be proved was in favour of and not against his interest.

Blanco White for the plaintiff. The evidence is admissible. The declaration was prima facie against Adams' interest, because a person in possession of real estate is presumed to be owner in fee. The Court will not admit evidence to rebut that presumption. The declaration was admitted in *Sly* v. *Sly* (1) in this Court; and *Reg.* v. *Birmingham Overseers* (2) and *Reg.* v. *Exeter Guardians* (3) clearly show that the prima facie presumption as to ownership of real estate will prevail, though if all the circumstances were examined the title might be shown to be different.

He also referred to *Peaceable* v. *Watson* (4) and *Wargent* v. *Hollings*. (5)

Clifford Mortimer in reply referred to *Taylor* v. *Witham*. (6)

HORRIDGE J. If the statement of Mr. Adams can properly be received in evidence, it is evidence that the will was in

(1) (1877) 2 P. D. 91.
(2) (1861) 1 B. & S. 763.
(3) (1869) L. R. 4 Q. B. 341.
(4) (1811) 4 Taunt. 16.
(5) (1832) 4 Hagg. Ecc. 245, 249.
(6) (1876) 3 Ch. D. 605.

1922

ADAMS, *In re.* BENTON *v.* POWELL.

Horridge J.

existence after the death of the testatrix. The only ground on which it can be received is the well-known rule regarding declarations by deceased persons against their pecuniary or proprietary interest. If the true facts in the case are examined, it is admitted that without the will the dead man had nothing out of his wife's estate; under the will he took a life interest in her estate, and, therefore, it was to his advantage to make a statement which would enable the will to be proved. If the test is whether, when all the facts are inquired into, the declaration is found to be against the interest of the person making it, I should hold this statement to be inadmissible.

On the other hand it is said that the man was in possession of the house, and in the absence of other evidence that possession raised the presumption that he was the tenant in fee; and that any statement which limits that interest was therefore in derogation of his title. That was the view expressed in *Sly* v. *Sly* (1) and in *Reg.* v. *Birmingham Overseers.* (2) In neither of those cases was there any evidence to rebut the presumption arising from possession. The case of *Reg.* v. *Exeter Guardians* (3), however, makes it clear that any statement which is prima facie against the interest of the speaker is admissible even if, when the facts are examined, it may not turn out to be detrimental. I think, also, that the last case quoted by Mr. Mortimer, *Taylor* v. *Witham* (4), appears to be of the same effect.

I hold that the declaration is admissible, and I pronounce for the will as contained in the completed draft.

Solicitors: *Harry F. Strouts, for L. Bolitho Way, Portsmouth; Theodore Goddard & Co., for John Vaughan & Son, Merthyr Tydfil.*

(1) 2 P. D. 91.
(2) 1 B. & S. 763.
(3) L. R. 4 Q. B. 341.
(4) 3 Ch. D. 605.

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.
1922
April 7, 10;
May 31.

THE SAN ONOFRE.

Shipping—Collision—Statutory Duty to assist damaged Vessel—Stranding while rendering Assistance—Damage due to Stranding—Direct Cause—Remoteness—Merchant Shipping Act, 1894 (57 & 58 *Vict.* c. 60), *s.* 422.

Two steam vessels, the *S. O.* and the *M.*, came into collision in a dense fog. The *M.* received very serious damage, the *S. O.* was damaged to a slight extent. The *S. O.* took off the crew of the *M.* and then endeavoured to save the *M.* by lashing herself alongside and towing towards shallower water inshore. While so proceeding the vessels grounded in the fog, whereby the *S. O.* received damage. The stranding was held to have occurred without negligence, but the *M.* was held alone to blame for the collision and the damages were referred to the registrar. The owners of the *S. O.* included in their items of damage the amount of the damage caused by the stranding and the registrar allowed it, but on appeal Duke P. disallowed the item.

By s. 422 of the Merchant Shipping Act, 1894, in every case of collision "it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel crew and passengers (if any), to render to the other vessel, her master crew and passengers (if any), such assistance as may be practicable. . . . ":—

Held, affirming the decision of Duke P. (Atkin L.J. dubitante), that on the facts assistance could not be rendered "without danger" to the *S. O.*, and that accordingly the stranding damage could not be connected with the collision negligence on the ground that there was a statutory duty under s. 422 of the Merchant Shipping Act, 1894, on the master of the *S. O.* to render assistance to the *M.*; that the stranding damage was not the direct result of the negligence causing the collision; and that the damage was too remote.

APPEAL from a decision of Duke P. on a motion in objection to the report of the registrar on a reference to assess damages.

The appellants were the owners of the steamship *San Onofre;* the respondents were the owners of the steamship *Melanie.*

The facts, as stated by the learned President, were as follows: The two vessels were in collision on December 27, 1916, in the Bristol Channel some five or six miles to the southward and westward of Nash Point. The collision took place in a dense fog. The *Melanie* was so badly damaged

C. A. 1922

THE SAN ONOFRE.

that her master and crew immediately came on board the *San Onofre*. The *San Onofre* was damaged, but not so much that she could not proceed under her own steam or in such a direction as her master might think fit to take. The master of the *Melanie* was ready to abandon his ship, but the master of the *San Onofre* thought that she might be brought to port and determined to try to take her into Barry dock. He secured the assistance of a vessel then in the public service, the *Urania*, and after the delay of about an hour the three vessels lashed themselves together and the *Melanie* was brought in towards the dock, but by reason of the fog the vessels grounded on the coast at some distance from the dock. In the litigation which then ensued the *Melanie* was held alone to blame for the collision, and the stranding was held to have occurred without negligence. The damage to the *San Onofre* was referred to the registrar and merchants, and the registrar found that the damage occasioned by her taking the ground was damage which was a result of the collision, so that the expenses resulting from it could be recovered as damage arising from the collision. The owners of the *Melanie* moved in objection and asked that the report, so far as that finding was concerned, should not be confirmed. The appeal was allowed.

The learned President, in delivering judgment, said that if there was a statutory duty on the master of the *San Onofre* to render the services the vessel was rendering when she went aground there would be a strong prima facie case in favour of the proposition that the damage so suffered was the immediate result of the collision. By s. 422 of the Merchant Shipping Act, 1894, it was provided that in every case of collision "it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel crew and passengers (if any), to render to the other vessel, her master crew and passengers (if any), such assistance as may be practicable. . . . ." It was a question of fact whether the *San Onofre* could "without danger" proceed to salve the *Melanie*. His Lordship dealt with the facts and said that he had come to the conclusion that under

the circumstances assistance could not be rendered to the *Melanie* without danger to the *San Onofre* and that accordingly s. 422 did not put upon the master of the *San Onofre* the obligation to take the *Melanie* in tow. It was said, however, that a seaman placed in the position of the master of the *San Onofre* would inevitably do what the master of the *San Onofre* did. That was a fascinating proposition. In his Lordship's opinion it was a natural thing for the master to do. But was that enough ? It was not inevitable in point of duty ; if it were inevitable at all it was because of the inclination of the master and crew of the *San Onofre*. It was not enough in his judgment to say that the damage complained of was such a consequence as would result from the determination of a courageous man who saw a vessel or property or lives in danger. The damage must result directly and immediately from the act of negligence complained of—the collision. His Lordship thought that in the argument for the owners of the *San Onofre* they had never got beyond the stage that the decision to salve was the natural result of the collision, and that the stranding was a natural result of the salvage. If that were the true view of the matter, it put the stranding not immediately in causative sequence with the collision but one place removed. In his judgment that was the most favourable way in which the case could have been put. He was not, however, able to accept the conclusion that the salvage was in law the reasonable and natural result of the collision. To be the reasonable and natural result on the part of the person who sets up the claim in respect of the damage suffered, it must be a result imposed upon him by the fact of which he complains. In his Lordship's view the determination of the master of the *San Onofre* to salve the *Melanie* was a determination which he was free to resolve upon, and the subsequent mischances in the salvage were mischances in an enterprise independently undertaken by him and not consequences thrown upon him without volition on his part as part of the damage of the collision in which he was involved by the fault of the *Melanie*. The motion therefore succeeded. There was a salvage action pending by the owners of the *San*

C. A. 1922

THE SAN ONOFRE.

Onofre. What effect ought to be given in the assessment of salvage damage—if there were salvage—to the fact that in the rendering of the service relied on the *San Onofre* went aground it was not for the Court in the present proceedings to forecast.

The owners of the *San Onofre* appealed.

Bateson K.C. and *Dumas* for the appellants. The duty of standing by and rendering assistance after a collision has always been rigorously enforced: see *The Celt* (1); *The Hannibal; The Queen* (2); and the observations of Sir Robert Phillimore in *The Thuringia* (3) and *The Adriatic.* (4) In *The Beta* (5) Butt J. so highly rated the duty that he declined to give salvage to the vessel which rendered assistance. For cases in which it has been held that the circumstances excused the vessel from standing by and rendering assistance as required by s. 422 of the Merchant Shipping Act, 1894, see *The Kirkwall* (6); *The Tryst* (7); *The Pitgaveney.* (8) In the present case the *San Onofre* had received very little damage and could render assistance, "without danger," or, in the words of s. 6 of the Maritime Conventions Act, 1911, "without serious danger"—which must mean without danger at the time. The master of the *San Onofre*, therefore, was under a statutory duty in consequence of the collision to render assistance to the *Melanie.* But apart from the statutory duty it was the reasonable and natural thing for the master to do. He did not know at that time which vessel might be held to blame, and his owners might have been liable for a total loss if the *Melanie* had sunk. He therefore wanted to get the *Melanie* into shallower water. If he had deliberately put the vessels ashore to prevent the *Melanie* sinking, the resulting damage clearly would have been the direct consequence of the collision: cf. *The City of Lincoln* (9); *The*

(1) (1836) 3 Hagg. Adm. 321.
(2) (1867) L. R. 2 A. & E. 53.
(3) (1872) 1 Asp. M. L. C. 283, 292.
(4) (1875) 3 Asp. M. L. C. 16.
(5) (1884) 5 Asp. M. L. C. 276.
(6) (1909) 11 Asp. M. L. C. 173, 180.
(7) [1909] P. 333.
(8) [1910] P. 215.
(9) (1889) 15 P. D. 15.

London. (1) In *In re Polemis and Furness, Withy & Co.* (2) the wrongdoers were held liable for the direct consequences of their negligence, although those consequences could not reasonably have been anticipated. *Weld-Blundell* v. *Stephens* (3) stands on a different footing, as the damage resulted from the wrongful and voluntary act of a free agent.

[ATKIN L.J. referred to *Clark* v. *Chambers*. (4)]

Butler Aspinall K.C. and *H. I. Stranger* for the respondents. The master of the *San Onofre* could not render assistance without incurring very considerable danger. In a dense fog to lash alongside a waterlogged vessel which might have sunk at any moment involved a high degree of risk. Further, the master had to consider future perils. He did not know his exact point of departure, and he was steering in towards the land, and, in fact, without negligence, the vessels piled themselves up on the main. The act of the master of the *San Onofre*, therefore, was entirely voluntary. Since the decision in *Weld-Blundell* v. *Stephens* (3) the test as to whether damages are recoverable is whether they are directly caused by the negligence complained of; it is not necessary to decide whether they are the "natural and probable" consequence.

[SCRUTTON L.J. There would seem to be a question whether in the light of *Weld-Blundell* v. *Stephens* (3) the statement of Bowen L.J. in *The Argentino* (5) that damage must "flow directly and in the usual course of things from the wrongful act" is accurate.]

In the present case the damage did not flow directly, the chain of causation was broken by the voluntary act of the master. In *The City of Lincoln* (6), relied on by the appellants, the damage obviously flowed directly from the loss of the vessel's charts and compasses.

[*Hobbs* v. *London and South Western Ry. Co.* (7) and *McMahon* v. *Field* (8) were also referred to.]

(1) [1914] P. 72.
(2) [1921] 3 K. B. 560.
(3) [1920] A. C. 956.
(4) (1878) 3 Q. B. D. 327.
(5) (1888) 13 P. D. 191, 201.
(6) (1889) 15 P. D. 15.
(7) (1875) L. R. 10 Q. B. 111.
(8) (1881) 7 Q. B. D. 591.

C. A. 1922

THE SAN ONOFRE.

Dumas in reply. It would have been very remarkable if the master of the *San Onofre* had not attempted to render assistance, and it does not lie in the mouth of the wrongdoers who received the benefit of the assistance to contend that the assistance ought not to have been rendered.

Cur. adv. vult.

1922. May 31. The following judgments were read :—

BANKES L.J. The proposition for which the appellants contend is that where two vessels have been in collision, and the vessel which is wholly to blame is being assisted to a place of safety by the other vessel, if the latter while so assisting meets with an accident not due to any negligence, and is damaged, the vessel which is wholly to blame is liable not only for any damage caused to the other vessel by the collision, but also for any damage the result of this accident.

It is not necessary to state the facts of the case in detail, as they are fully set out in the judgment of the President. The accident in the present case occurred within two hours of the collision. If the proposition contended for is sound it would be immaterial whether the accident occurred two hours or two days or two weeks after the collision.

The argument is based upon two grounds: (1.) that the damages resulting from the accident were the natural and probable result of the collision, and as such are recoverable. (2.) That in rendering assistance to the injured vessel the *San Onofre* was acting in pursuance of a statutory duty, and that the damage she suffered whilst so acting was thus sufficiently connected with the collision to render the damages claimed recoverable.

Upon the first point I agree with the view taken by the President. I cannot distinguish the case from that of two pedestrians who collide in the street, and the one whose negligence caused the collision is injured, and is assisted to the hospital by the other, there being no one else available to render such assistance. If on the way to the hospital the one who is assisting the other accidentally slips and breaks his leg, he cannot, in my opinion, claim damages from that other on

the ground that but for the negligence in bringing about the collision he could not have been where he was, and would not have slipped and broken his leg. The collision no doubt caused a state of things which rendered it natural that the assistance should have been rendered; the motive which led to the rendering of the assistance seems to me to be quite immaterial. It may have been purely humanitarian, and therefore praiseworthy; it may have been purely mercenary, and therefore unworthy; it may have been a mixture of the two. Whichever it was, the result appears to me to be the same. The man or the vessel, as the case may be, was a pure volunteer, and the negligence which caused the collision cannot be said—adopting Lord Sumner's language in *Weld-Blundell* v. *Stephens* (1)—to be the direct cause of the subsequent accident. A number of cases were cited by the appellants' counsel in support of this argument. I do not think they are of any assistance in deciding this case, as each decision must depend upon the particular facts of the case. For instance, in *The Despatch* (2), where the decision turned upon the fact that as the collision broke one of the chains of the vessel claiming damage, and so weakened her power to resist the force of the gale, the collision might be regarded as the efficient cause of the subsequent accident which in that case was the driving of the vessel on to the rocks. In *The City of Lincoln* (3) the Court held that the grounding of the barque subsequent to the collision was the natural and reasonable consequence of the collision, because the barque had lost her steering compass and log-line and charts in the collision, and this deprived the captain of the means of ascertaining his position and of properly navigating his ship.

I express no opinion as to whether the appellants' position would have been any better if it could have been established that in rendering assistance to the *Melanie* the master of the *San Onofre* was acting under a statutory duty. The President held that he was not acting under any such duty. Here,

(1) [1920] A. C. 956, 983, 984. (2) (1860) 14 Moo. P. C. 83.
(3) 15 P. D. 15.

C. A. 1922

THE SAN ONOFRE.

Bankes L.J.

again, I agree with the President. The duty of rendering all possible assistance to a vessel in distress cannot be too strongly insisted upon, and one does not sympathise with a defence such as is suggested here. In the case of a collision between two vessels, the duty upon the master or person in charge of each vessel to stand by and to render such assistance as is possible, is a statutory duty, and the failure without reasonable cause to fulfil that duty is a criminal offence. The provision to that effect is contained in s. 422 of the Merchant Shipping Act, 1894. The obligation is qualified by the limitation of the duty to cases where it can be exercised without danger to the master's own vessel, crew, and passengers. In the present case the owners of the *Melanie* contend that the assistance rendered by the *San Onofre* was rendered under such dangerous conditions that it is not permissible for her owners to contend that the master was acting in performance of his statutory duty. The President has accepted this contention. Whether the conditions were such as to justify his conclusion is a question of fact. I am certainly not prepared to disagree with him; and if the proper test to apply is to consider whether, had the master not rendered the assistance, there would have been any reasonable prospect of securing a conviction against him for failing to perform his statutory duty, I have no hestitation in saying that there would not. For these reasons I consider that the appeal fails on both grounds, and must be dismissed with costs.

SCRUTTON L.J. The question in this appeal is whether the President was right in holding that certain damage caused to the owners of the *San Onofre* by the stranding of the *San Onofre* while attempting to salve the *Melanie* was recoverable by the *San Onofre* as damages occasioned by the negligence of the *Melanie* in colliding with the *San Onofre*.

Shortly, the facts are that about 9.30 A.M. on a foggy morning in the Bristol Channel the *Melanie* collided with the *San Onofre*, and has been found alone to blame for the collision. The *Melanie* was seriously damaged, so that her

master and all her crew came on board the *San Onofre*. The *San Onofre* was very slightly damaged, some rivets being started in the forepeak. The master of the *San Onofre*, to use his own words, " thought there was a chance of saving the *Melanie* and also of getting her out of the traffic." He persuaded some of her crew to return to her, lashed the *San Onofre* to one side, and his escort, the armed trawler *Urania*, to the other side, and started towing the *Melanie* in the fog inshore into shallow water and out of the traffic, meaning to take her to Barry. Nearly two hours after the collision, and three-quarters of an hour after the towage began, the three vessels stranded in the fog on the Welsh shore, and damage was done to the *San Onofre* and the *Melanie*. It has been found that the stranding was not due to any negligence on the part of the *San Onofre*. The question is whether the damage to the *San Onofre* by stranding is the direct consequence of the original negligence of the *Melanie* in colliding with her.

Where a ship alone to blame for a collision does damage to another ship which, while in her damaged condition is subsequently lost, the prima facie assumption in the Admiralty Court is that the subsequent loss is occasioned by the collision, the burden being on the ship in fault to displace that presumption by showing that the loss did not arise out of the collision, one example being where it is shown that the ultimate loss was caused by negligence on the part of the damaged ship : see per Dr. Lushington in *The Pensher* (1) and *The Mellona* (2) ; and see also *The City of Lincoln*. (3) In all these cases, however, the ship ultimately lost had sustained damage in the original collision which might have contributed to the ultimate loss. The position would probably be the same if by breach of duty a ship otherwise undamaged were left in a position of danger in which she would not have been had the duty been performed : see, however, the difficult questions raised in *Wilson* v. *Newport Dock Co.* (4) But in all these cases the ultimate

(1) (1857) Swa. 211.
(2) (1847) 3 W. Rob. 7.
(3) 15 P. D. 15.
(4) (1866) L. R. 1 Ex. 177.

C. A. 1922

THE SAN ONOFRE.

Scrutton L.J.

damage must be a direct consequence of the collision, a wrongful act through the damage caused immediately by the collision.

In the present case, if a strange ship had come up and attempted to salve the *Melanie*, and had gone ashore without negligence while doing so, it would, I think, be impossible to recover her damages by stranding as the direct consequence of the *Melanie's* negligence in colliding. The *Urania* could not recover her stranding damage, as damages by collision. The recompense for stranding, if any, must be recovered in a salvage action in proportion to the value of the services rendered and as part of their cost. The *San Onofre* could only be in a better position than the strange salvor in two cases. First, if the direct collision damage was the cause of the ultimate stranding damage as in *The City of Lincoln*. (1) But in the present case the actual slight collision damage to the *San Onofre* had nothing to do with the subsequent stranding. Secondly, if the *Melanie's* negligence in damaging herself put the *San Onofre* under a legal duty to save her, and in carrying out that legal duty without negligence the *San Onofre* damaged herself, there might be a direct chain of causation between original negligence and ultimate damage. In support of this view, s. 422 of the Merchant Shipping Act, 1894, was relied on, which imposes on the master of a vessel in collision a duty, enforceable by prosecution, to render to the other vessel such assistance as may be practicable. But this duty is only imposed if and so far as the master can do so without danger to his own vessel, crew and passengers. This restriction is obviously reasonable, for an owner whose ship is not to blame can hardly be required to endanger her as a matter of duty enforceable criminally, to save a wrongdoer. In the present case there was obviously danger to the *San Onofre* in taking her in a fog towards shore, as is shown by the fact that she went ashore without negligence. In my view it would have been impossible successfully to prosecute the master of the *San Onofre*, if, when he had taken the *Melanie's* crew on board, he had sailed away. His answer of danger to his

(1) 15 P. D. 15.

owners' vessel would have been conclusive. The attempt to connect the stranding damage with the collision negligence, by means of a legal duty imposed on the *San Onofre*, therefore fails.

I do not discuss the cases cited; they are numerous and bewildering; but the question whether damage is sufficiently direct consequence of negligence to be recoverable, or is too remote, is rather a question of first impression. I am clear that if a negligent driver on the road injures himself in a collision with another vehicle, whose driver and a stranger thereupon take the injured man to hospital and meet with an accident in so doing, neither of them can recover damages for the accident from the negligent driver as consequences of his original negligence. The present case seems to me exactly similar. In my view the registrar came to an erroneous decision; and the President arrived at a correct result. The appeal should be dismissed with costs. Any remedy the *San Onofre* may have is in an action for salvage remuneration, on the prospects of success in which I express no opinion.

ATKIN L.J. I have felt considerable doubt in this case in respect of both the points argued. I do not think it is possible to overrate the importance of maintaining the statutory duty imposed by s. 422 of the Merchant Shipping Act, 1894, first enacted in the Merchant Shipping Act, 1862, s. 33, an Act that attached a statutory obligation to a duty that has been recognized from time immemorial by British shipmasters. From 1862 to 1911 this appears to have been the only section dealing with an obligation to save life, and in my opinion the qualification "without danger" must be read in reference to the subject matter—i.e., the duty of saving life at sea. I should be very sorry to lay down that any degree of danger, however slight, in performing the contemplated duty, would absolve the master from his statutory obligation. I should suppose that there must be an appreciable and real danger in excess of the peril to be anticipated under ordinary conditions of navigation attending a voyage at sea. It is

C. A. 1922

THE SAN ONOFRE.

Atkin L.J.

true that in the Maritime Conventions Act, 1911, the duty expressed in s. 422 of the Merchant Shipping Act, 1894, is re-enacted in a much wider form so far as relates to saving life. It is not confined to a duty arising in case of collision and the words used are "without serious danger." I doubt whether the degree of danger which will excuse the duty is substantially modified by this addition. Nor in a civil case do I think it necessary, for the purpose of determining whether there is a breach of duty, to consider whether if a criminal charge were made against the master, a jury would convict. It is because I should be very sorry to pay lip service only to the importance of this statutory duty that I have been anxious to see in this case that it has not been too lightly negatived. I am, moreover, inclined to think that if a master established that he bona fide considered that this duty had arisen, and if the other ship takes the benefit of the assistance rendered in performance of the supposed duty, the Court should scrutinise carefully any suggestion by the assisted ship that the assistance was too dangerous and should not have been given. I agree, however, that the final determination of the question must turn on a question of fact; and in view of the opinion of the President and the agreement of the other members of the Court, I am not prepared to say that I am satisfied that the decision on this point was wrong.

Apart from the statutory duty, I think that there is a great deal to be said for the view taken by the learned registrar. The emergency caused by a collision may be such as to compel any normal person to take a particular course of action, in the sense of affording such strong motives for that particular action that every reasonable person would be induced by them so to act. I see no reason why damage occasioned in the course of such action may not give rise to a claim for damages by the collision if the damage can be directly associated with the original wrongful act. For instance, take the case put of a collision between motor-cars where the wrongdoer was in danger of losing his life unless hurried to medical care, if the other party using the only reasonable means hurried him to

hospital in the injured car and the car in consequence incurred further injuries, or the driver was in consequence injured, I think such injuries might well be the direct result of the original collision. And I should desire to reserve the case decided in the American Courts of injuries sustained by a passer-by in reasonably attempting to snatch a child or other person from the course of a negligently driven vehicle. In this case, there appears to me evidence that the stranding in the course of the joint voyage to refuge was directly connected with the collision; the voyage was in shallow waters because of the collision damage. The *Melanie* first stranded and the *San Onofre* might have escaped if she had not been necessarily bound to the crippled *Melanie*. But the plaintiffs have to establish the claim: and I understand the President not to be satisfied that the expedition undertaken by the *San Onofre* was due to the impelling desire to assist the injured ship, but to be possibly due to a desire to earn salvage, or some other motive. In this respect the question of direct cause is ultimately one of fact, and I am not prepared to dissent from the judgment below.

Appeal dismissed.

Solicitors for the appellants: *Thomas Cooper & Co.*

Solicitors for the respondents: *Downing, Middleton & Lewis.*

E. C. M. T.

1922
July 10.

ADMIRALTY.

THE ILE DE CEYLAN.

Shipping—Priorities—Seizure of Ship by Sheriff under Writ of fi. fa.—Arrest by Marshal in action in rem for Wages and Disbursements—Sheriff's Costs.

A vessel seized under a sheriff's writ of fi. fa. was subsequently arrested and sold by the Admiralty marshal at the instance of the master in an action in rem for wages and disbursements. The sums claimed by the master, which exhausted the proceeds, were owing before the date of the seizure by the sheriff. The master moved for judgment and payment out of the proceeds. The sheriff intervened and claimed that his fees and expenses should be a first charge on the proceeds:—

Held, that the master having a maritime lien in respect of his claim, the sheriff could only seize the vessel subject to that lien; that the master's claim accordingly had priority over the claim of the sheriff; and that the sheriff must look to the execution creditors for payment of his fees and expenses.

MOTION for judgment and to determine priorities.

The plaintiff, the master of the French auxiliary schooner *Ile de Ceylan*, moved for judgment in default of appearance upon his claim for 962*l.* for wages and disbursements.

Before the issue of the master's writ in the Admiralty Division the *Ile de Ceylan* had been seized by the Sheriff of Glamorganshire under a writ of fi. fa. in execution of a judgment obtained in the King's Bench Division by Messrs. Moxey, Savon & Co. in respect of necessaries (coals) supplied to the vessel. An abortive attempt to sell was made by the sheriff, but no adequate bid was received and the vessel was eventually sold by the marshal. The net proceeds, after payment of docking charges and the marshal's expenses, only amounted to 290*l.* 9*s.* 11*d.* The sheriff intervened and asked that his fees and expenses should constitute a first charge on the proceeds.

E. A. Digby for the master. The master had a maritime lien in respect of his claim, and the sheriff could only seize the ship subject to that lien: *The James W. Elwell.* (1)

(1) [1921] P. 351.

Further, although in practice the sheriff reimburses himself out of the proceeds, in law he must look for his costs to the person who has issued the execution—namely, the execution creditors: *Montague* v. *Davies, Benachi & Co.* (1) The master, therefore, is entitled to payment out of the proceeds in priority to the sheriff.

Rayner Goddard for the Sheriff of Glamorganshire. The sheriff's costs and charges were incurred before steps were taken to enforce the master's maritime lien. Further, by taking possession when he did, it is possible that the sheriff really brought the fund into existence, as the vessel might have sailed before she could have been arrested by the marshal. Accordingly, the master's lien ought to be subject to the claim of the sheriff.

HILL J. This is a motion in an action by the master of the *Ile de Ceylan*, suing for wages and disbursements. He issued his writ on August 4, 1921, and the ship was arrested in his action by the marshal on August 16. Before that date, in June, 1921, the Sheriff of Glamorganshire had seized the vessel and was in possession of her at the time of the arrest by the marshal. The seizure by the sheriff was in execution of a judgment obtained by Messrs. Moxey, Savon & Co. in the King's Bench Division. On November 14, 1921, I made an order for the appraisement and sale of the vessel, and reserved the rights of the execution creditors who were in possession by the sheriff under a writ of fi. fa.

The execution creditors do not appear, but the sheriff has appeared and it is contended on his behalf that the first charge on the proceeds should be his fees and expenses, in priority to the claim of the master. The total claim of the master considerably exceeds the net proceeds, which amount to 290*l.* 9*s.* 11*d.* But for the activities of the marshal and the readiness of the Penarth Dock Co. to fall in with his suggestion to reduce their dues, there would not have been any fund at all.

The master asks for judgment, and that he must have.

(1) [1911] 2 K. B. 595.

1922

THE ILE DE CEYLAN.

HILL J.

In ordinary course the judgment would be subject to a reference, but in the circumstances it is agreed that that is not necessary. The question then arises as to who, in priority, has the first claim upon the fund. The plaintiff master had a maritime lien in respect of his claim, and his claim, to an amount more than sufficient to exhaust the whole of the proceeds, had arisen before the sheriff took possession under his execution. The master, therefore, to that amount had a maritime lien at the time the sheriff seized. A sheriff put in by an execution creditor can only seize that which is the property of the execution debtor. Therefore he could seize the ship subject only to any maritime lien which was attaching to it. To allow the sheriff to have a first charge on the fund would be, it seems to me, to say that the sheriff is entitled to disregard the maritime lien on the property seized, and, in effect, to say that the sheriff's expenses are to be paid, not by the execution creditor, but by the master who has a maritime lien on the property of the execution debtor. The sheriff in my opinion has no such right. It is said that his expenses ought to be allowed as a first charge upon the proceeds, because it was by reason of his seizure that the fund was brought into Court or the ship kept in this country so that she could be arrested in the master's action. I cannot find that any act of the master or execution creditors has resulted in creating the fund for the benefit of the maritime lien holder in this case.

The sheriff, of course, is not without his remedy. He was employed by the execution creditors, who will remain liable for his costs and charges, but I cannot allow those costs and charges to be paid out of the fund belonging to the maritime lien holder. There will be judgment for 962*l.* and costs and an order for payment out to the plaintiff master of the fund in Court.

Solicitors for the plaintiff: *Downing, Middleton & Lewis, for Downing and Handcock, Cardiff.*

Solicitors for the intervener: *Peacock & Goddard.*

E. C. M. T.

[IN THE COURT OF APPEAL.]

C. A.
1922
May 23;
June 19;
July 12.

THE TERVAETE.

Shipping—Collision—Foreign State-owned Vessel—Maritime Lien—Vessel sold into private Ownership—Jurisdiction—Immunity from Arrest.

Damage occasioned by collision with a foreign state-owned vessel does not impose a maritime lien upon the vessel, and if the vessel be subsequently sold into private ownership she is not then liable to arrest in an action in rem.

Decision of Duke P. ante, p. 197, reversed.

APPEAL from a decision of Sir Henry Duke P. sitting in Admiralty, dismissing a motion to set aside a writ in an action in rem. (1)

The appellants, defendants in the action, were the owners of the steamship *Tervaete;* the respondents were the owners of the steamship *Lynntown.*

The action was brought to recover damages in respect of a collision which took place between the *Lynntown,* a British vessel, and the *Tervaete* on May 18, 1920, in the port of Bonanza, on the Guadalquivir River. At that time the *Tervaete* belonged to the Government of the King of the Belgians and was being run as a coal ship for public purposes. After the collision she was sold by the Belgian Government into private ownership, and at the time of the commencement of the present proceedings she was the property of the Société Anonyme Belge d'Armement et de Gérance. The plaintiffs issued and served their writ on January 10, 1922, the *Tervaete* being then in Barry Dock; but they refrained from arresting her in consideration of an undertaking by the solicitors for the defendants to enter an appearance and put in bail. Appearance was entered under protest, and a motion was then set down by the defendants to discharge the solicitors' undertaking and to set aside the writ.

Duke P. held that a foreign state by its authorized agents could impose a lien upon one of its public ships, and that the lien might be enforced if it could be done without directly or

(1) Ante, p. 197.

C. A. 1922

THE TERVAETE.

indirectly impleading the foreign state. He was of opinion that the maritime lien in the present case was capable of being enforced without any assertion of jurisdiction over the Belgian state or its property and accordingly dismissed the motion. The defendants appealed.

Bateson K.C. and *E. Aylmer Digby* for the appellants. The Court had no jurisdiction to entertain the action. As a state-owned vessel is immune from arrest no maritime lien can attach to her, and if it never attached it cannot revive when the vessel is sold into private ownership. A maritime lien does not attach in every case of collision—e.g., collisions caused through the barratrous acts of the master or, before the Pilotage Act, 1913, by the negligence of a compulsory pilot, do not give a right of action against the owners: see also *The Tasmania* (1) as to the position of vessels under charter.

[SCRUTTON L.J. This collision took place in a Spanish port; before the Admiralty Court Act of 1861 the Court would not have entertained such an action: *The Ida.* (2)]

No. It has, however, been held that Alexandria and Algiers are "on the high seas," because they are not within the body of a county: *The Mecca.* (3)

A maritime lien is not a lien at all; it is a claim to priority involving an action in rem and therefore impleads the owner of the res. It was defined in *The Bold Buccleugh* (4) as "a claim or privilege to be carried into effect by legal process"; and in *Currie* v. *M'Knight* (5) Lord Watson described it as a remedy against the corpus of the offending ship: see also *The Dictator* (6) and *The Ripon City* (7), where the nature of a maritime lien was fully discussed. The collision with the *Lynntown* gave her owners no claim against the then owners of the *Tervaete* which could be carried into effect by legal process; and Brett L.J. said in *The Parlement Belge* (8) that "the property cannot be sold as against the new owner, if

(1) (1888) 13 P. D. 110.
(2) (1860) Lush. 6.
(3) [1895] P. 95.
(4) (1851) 7 Moo. P. C. 267, 284.
(5) [1897] A. C. 97, 106.
(6) [1892] P. 304.
(7) [1897] P. 226.
(8) (1880) 5 P. D. 197, 218.

it could not have been sold as against the owner at the time." Similarly in *The Castlegate* (1) Lord Watson said that the general principle of maritime law was that "inasmuch as every proceeding in rem is in substance a proceeding against the owner of the ship, a proper maritime lien must have its root in his personal liability": and Sir Francis Jeune in *The Utopia* (2) made similar observations. The President, therefore, was wrong in holding that there was a maritime lien capable of being given effect to without impleading the foreign state. A dormant maritime lien attaching to a state-owned vessel necessarily diminishes the value of the state's property. A maritime lien is, in the words of Barnes J. in *The Ripon City* (3), a jus in re aliena, and to allow such a lien to attach at all would be a subtraction from the absolute property of the owner. The cases in which there have been cross-claims against a foreign sovereign or sovereign states—e.g., *The Newbattle* (4)—stand in a different category; for if a foreign sovereign sues in a British Court he submits himself to the jurisdiction of the Court, and the Court naturally will see that justice is done. If, therefore, there is a counter-claim or cross-action the Court, if necessary, will order the foreign sovereign to give security: *The Newbattle.* (4) While there is no English authority on the question at issue, it arose recently in the United States, and the Supreme Court decided by a majority that no maritime lien attached in the case of collision with a Government-owned vessel: *United States of America, Owners of the Western Maid* v. *Auxiliary Schooner Liberty and Steamship Carolinian.* (5)

[Reference was also made to *The Aline* (6) and, on the position of requisitioned vessels, *The Broadmayne.* (7)]

C. R. Dunlop K.C. and *Dumas* for the respondents. There are two questions involved. Has the Admiralty Court jurisdiction to entertain the action at all, and, if it has, is there any ground why it should refuse to do so? As regards

(1) [1893] A. C. 38, 52.
(2) [1893] A. C. 492.
(3) [1897] P. 226.
(4) (1885) 10 P. D. 33.
(5) At present unreported.
(6) (1839) 1 W. Rob. 111.
(7) [1916] P. 54.

C. A. 1922

THE TERVAETE.

the locus, there can be no question that the Admiralty Court Act, 1861, gives the Court jurisdiction over cases of collision in foreign inland waters, whether the vessels concerned are British: *The Diana* (1), or foreign: *The Courier.* (2) The argument of the appellants confuses the position of the British Crown, which can do no wrong: cf. *Tobin* v. *The Queen* (3), with the position of a foreign sovereign, in favour of whom there is no such axiom. A foreign sovereign is not incapable of committing a tort. In *Mighell* v. *Sultan of Johore* (4) it was not suggested that the Sultan could not create against himself a good cause of action, nor in *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (5) that the Republic could not commit a libel. Also, a foreign sovereign who is plaintiff is liable to have a counterclaim or cross-action brought against him: *The Newbattle.* (6)

[BANKES L.J. In *The Newbattle* (6) the Court said it could not order the vessel to be seized.]

No, but the foreign sovereign was compelled to give security to answer the cross-action: see also *Strousberg* v. *Republic of Costa Rica.* (7) In *Magdalena Steam Navigation Co.* v. *Martin* (8), in which the position of an ambassador was considered, the case appears to have proceeded on the footing that the remedy was in suspension.

[SCRUTTON L.J. referred to *Musurus Bey* v. *Gadban.* (9)]

On the second point—namely, whether the Court ought to exercise jurisdiction, it will do so unless a claim of sovereignty is asserted, and the claim must be asserted by the foreign sovereign or some one on his behalf. It is not suggested by the secretary to the Belgian ambassador that the Belgian Government objects to the action against the *Tervaete;* the affidavit in support of the motion to set aside the writ is made by the Belgian Vice-Consul at Cardiff acting on behalf of the appellants, a commercial firm. The President was right in his conclusion that the maritime lien could be enforced without

(1) (1862) Lush. 539.
(2) (1862) Lush. 541.
(3) (1864) 33 L. J. (C. P.) 199.
(4) [1894] 1 Q. B. 149.
(5) [1897] 2 Ch. 487.
(6) (1885) 10 P. D. 33.
(7) (1880) 44 L. T. 199.
(8) (1859) 2 E. & E. 94.
(9) [1894] 2 Q. B. 352.

impleading the foreign Government. The date when the action is brought and not the date of the contract or tort is the material date: *Munden* v. *Duke of Brunswick.* (1) The rule in *The Parlement Belge* (2) is not infringed by the present action; and the dictum of Brett L.J. in that case, relied on by the appellants, is obiter, and further had reference to a different state of facts—the Lord Justice was discussing whether a lien could attach to a ship in the hands of a subsequent owner when there was no negligence on the servants of the owners at the time of the collision.

[Reference was also made to *The Ticonderoga* (3) and *The Porto Alexandre.* (4)]

Digby in reply. The fallacy in the respondents' case is their contention that there is a distinction between the case of an action against the British Crown and an action against a foreign sovereign or state, and that in the latter case the Court merely declines to exercise jurisdiction, while in the former it is admitted that the Court has no jurisdiction to entertain the action at all. Both cases stand on the same footing. There is no jurisdiction in either case: see *The Constitution* (5), where the defendants being a foreign state it was held that the Court had no jurisdiction to entertain the action: see also the report of *The Parlement Belge* in the Admiralty Court (6), where the Attorney-General's protest is set out, from which it appears that the point taken was absence of jurisdiction.

Cur. adv. vult.

July 12. The following judgments were read:—

BANKES L.J. The material facts lie in a small compass. In May, 1920, a collision occurred between the respondents' vessel, the *Lynntown,* and the *Tervaete,* which at that time was the property of the Belgian Government and employed on Government service. Subsequently to the collision the Belgian Government transferred the *Tervaete* to a private

(1) (1847) 4 C. B. 321; 10 Ad. & E. 656.
(2) 5 P. D. 197, 218.
(3) (1857) Swa. 215.
(4) [1920] P. 30.
(5) (1879) 4 P. D. 39.
(6) 4 P. D. 129, 131.

C. A. 1922

THE TERVAETE.

Bankes L.J

owner, and after she had been so transferred she came into Barry Dock. The respondents contend that as a result of the collision a maritime lien attached to the *Tervaete*, which now that she is private property and is found within the jurisdiction they are entitled to enforce by proceedings in rem in the Admiralty Court of this country. The present proceedings were taken by the respondents to test the correctness of that contention. The respondents do not contest the proposition that as a general principle of maritime law, in the case of a claim for damage arising out of collision, a proper maritime lien must have its root in the personal liability of the owner, or of the person for this purpose in the position of owner. The subject is very fully discussed by Gorell Barnes J. in *The Ripon City* (1), in which he gives a definition of maritime lien in language which is, I think, of assistance in this case. He says: "Such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner." The respondents further do not dispute that, so long as the *Tervaete* remained the property of the Belgian Government, no proceedings could be taken either in personam or in rem in respect of the damage done to their vessel by the collision.

The contention upon which the respondents relied in the Court below, and which was accepted by the President, was that the fact that no such proceedings could be taken was not due to an absence of any liability on the part of the Belgian Government for the negligence of their servants which brought about the collision, but to the rule introduced by international comity which prohibited the taking of any proceedings to enforce that liability. As a further contention founded upon the one just mentioned, it was said that a

(1) [1897] P. 226, 242.

maritime lien did attach to the *Tervaete* as a consequence of the collision, and though it remained, as it were, dormant and unenforceable during the ownership of the vessel by the Belgian Government, it became enforceable when the vessel passed into private ownership. These contentions raise the question whether a maritime lien ever did attach to the vessel at a time when she was owned by the Belgian Government. This is quite a different case from a case where a maritime lien attached to a vessel at a time when she was privately owned, and which vessel afterwards passed into Government ownership, and then into private ownership again. It may well be that in such a case the maritime lien is dormant during the period of Government ownership. The present case is quite distinct from that, and involves the question whether a maritime lien ever attached to the *Tervaete* at all.

I think it may be conceded for the purposes of the argument that the fact that a sovereign or a sovereign power cannot be proceeded against in the Courts of a foreign country does not exclude all idea of liability for a breach of contract, or for a tort, in the sense that under no circumstances can the sovereign or the sovereign state do wrong. The rule that where a foreign sovereign sues in the Courts of this country, proceedings may be taken against him in mitigation of the relief claimed by him, would be of no value except upon the assumption that claims for breaches of contract, or for torts, might be established and set off in mitigation. In *Imperial Japanese Government* v. *P. & O. Co.* (1), the whole discussion as to the Court in which proceedings might be taken would have been avoided had the law been that the Emperor of Japan could not be liable for damages resulting from the collision of his vessel with that of the defendants. The point was, however, not suggested in that case. In *The Newbattle* (2) it was assumed that the King of the Belgians might be held liable in damages in the cross-cause for the negligence of those in charge of his vessel, the *Louise Marie*. The fact that the immunity of an ambassador from

(1) [1895] A. C. 644. (2) 10 P. D. 33.

C. A. 1922

THE TERVAETE.

Bankes L.J.

process in the Courts of this country in respect of debts contracted while he was ambassador lasts during the time during which he is accredited to the sovereign and for such a reasonable period after he has presented his letters of recall to enable him to wind up his official business and to prepare for his return home, which is the law as laid down in *Musurus Bey* v. *Gadban* (1), points also in my opinion to the same conclusion. In the numerous cases such as *South African Republic* v. *La Compagnie Franco-Belge du Chemin de Fer du Nord* (2), in which the question arose of enforcing cross-claims in actions by sovereigns or sovereign states, it appears to me to be assumed that the cross-claims are in respect of breaches of conduct or of tort actually committed, and for which the sovereign or the sovereign state would have been responsible but for the immunity from process which he or they enjoyed.

In spite of the fact that so far I have accepted the arguments of the respondents in support of the judgment of the President, I am unable to agree with his final conclusion, and I do so upon a point to which his attention does not appear to have been specially directed. The point is founded partly upon the effect upon the property of the sovereign state if a maritime lien attached to the *Tervaete* as alleged, and partly upon a consideration of the nature of a maritime lien itself. If the judgment of the President is right, and the maritime lien attached to the *Tervaete*, the value of the vessel to the Belgian Government must necessarily have been affected; how seriously of course depends upon the amount of the respondents' claim. A vessel to which a maritime lien extends for any substantial amount must necessarily be worth less in the market than if she was free from any lien. In *The Bold Buccleugh* (3) Sir John Jervis when dealing with the question of a maritime lien adopts Lord Tenterden's definition of it, as a claim or privilege to be carried into effect by legal process; and he then goes on to say that a maritime lien is the foundation of the proceedings

(1) [1894] 2 Q. B. 352. (2) [1898] 1 Ch. 190.
(3) 7 Moo. P. C. 267, 284.

in rem, a process to make perfect a right inchoate from the moment the lien attaches. In *Currie* v. *M'Knight* (1) Lord Watson speaks of a maritime lien as a remedy against the corpus of the offending ship. Whether a maritime lien is properly to be regarded as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, or as a means of securing a priority of claim, it cannot, in my opinion, consistently with the rule of immunity laid down by the law of nations, be attached to a vessel belonging to a sovereign power and being used for public purposes. To allow such a lien to attach would be, to use Gorell Barnes J.'s language in *The Ripon City* (2), to create a jus in re aliena, a subtraction from the absolute property of the sovereign state.

I may here refer to *Musurus Bey* v. *Gadban* (3), in which the immunity from process of an ambassador was considered. It was argued in that case that it was permissible to issue a writ against an ambassador in order to prevent the running of the Statute of Limitation, provided no further step of serving or attempting to serve was taken. The Court, taking the same view as was taken in *Magdalena Steam Navigation Co.* v. *Martin* (4), refused to accept the contention. Davey L.J. said: "With regard to the first" (that is the contention I have just referred to) "it is in my opinion sufficient to refer to the 3rd section of 7 Anne, c. 12, which makes all writs and processes, whereby the person of any ambassador or other public minister may be arrested or imprisoned, or his goods and chattels may be distrained, seized, or attached, utterly null and void. It has been decided in *Magdalena Steam Navigation Co.* v. *Martin* (4) that this section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory

(1) [1897] A. C. 97, 106.
(2) [1897] P. 226.
(3) [1894] 2 Q. B. 352, 360.
(4) 2 E. & E. 94.

C. A. 1922

THE [TERVAETE. [Bankes L.J.

only of the common law) is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in the *Magdalena Case*, and that all that it was necessary to decide was that that service was bad. But the grounds upon which the decision was based in Lord Campbell's judgment go beyond that point, and in my opinion show a total want of jurisdiction of the Court to entertain the action at all. Lord Campbell, at page 111, states the principle to be that for all juridical purposes an ambassador is supposed still to be in his own country, and he concluded his judgment in these words: 'It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles.' These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our Courts: see, for example, the latest case of *The Parlement Belge* (1) in the Court of Appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action which action the Court has no jurisdiction to entertain, and which writ, therefore, the Court has no jurisdiction to issue, can prevent the statute running."

It seems to me impossible consistently with the law as there expressed to hold that it is permissible to recognize a maritime lien as attaching to the property of a sovereign

(1) 5 P. D. 197.

or a sovereign state. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the lien. Each equally offends the rule affording immunity. If this is the correct view of the law then the appellants are entitled to succeed, because unless a maritime lien attached to the *Tervaete* while she was the property of the Belgian Government it cannot attach at all. In my opinion the appeal must be allowed with costs here and below and the order made with costs relieving Messrs. Downing and Handcock of their undertaking dated January 12, 1922, and setting the writ aside and staying all proceedings thereunder.

SCRUTTON L.J. In May, 1920, the English steamer, *Lynntown*, being in the Spanish port of Bonanza on the Guadalquivir River and within Spanish territorial waters, but on the "high seas," as that term is interpreted in the English Admiralty Court, sustained damage by collision with the steamship *Tervaete*. The *Tervaete* had been surrendered by the German Government to the allied powers, who handed her over to the Belgian Government, whose property she was at the time of the collision. After the collision the Belgian Government sold the *Tervaete* to private owners, under whose ownership she came to Barry Dock where she was arrested by a procedure in rem at the suit of the owners of the *Lynntown*. They alleged that the collision gave rise to a maritime lien, inchoate till the *Tervaete* came within British territorial waters, dormant till she ceased to be the property of the Belgian Government, but which could be enforced when the *Tervaete*, as the property of private owners, came within British jurisdiction.

The owners of the *Tervaete* replied that as the *Tervaete* at the time of the collision was the property of the Belgian Government, against whom no proceedings could be taken in personam and against whose ship no proceedings could be taken in rem, no maritime lien could arise. The President in a reserved judgment adopted the contention of the owners of the *Lynntown*, and the owners of the *Tervaete* appeal.

C. A. 1922

THE TERVAETE.

Scrutton L.J.

In my view it is now established that procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property. The so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants. It does not appear eo nomine in cases of collision in the reports till *The Bold Buccleugh* (1) was heard in 1851, where it is defined as a claim or privilege upon a thing to be carried into effect by legal process; and it is stated, erroneously as is now admitted, that wherever an action in rem lies there a maritime lien exists. The report proceeds: "This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

The cases as to the relation of a maritime lien to the personal liability of the owner are exhaustively examined by the late Lord Gorell in *The Ripon City*. (2) He comes to the conclusion that a maritime lien may exist, though the owner is not personally liable, where there is personal liability in those to whom he has voluntarily entrusted the control of the vessel, as charterers, though not if his entrusting is compulsory, as in the case of compulsory pilots. But for a lien to arise, in my view, some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision. If he is so liable, a privilege or lien at once arises in this sense, that if the vessel comes within English territorial waters it may be arrested, and the claim or privilege on it will date back to the time of the lien. Any purchaser after the collision takes the ship subject to this possibility of claim.

At the time of the collision, if it happened in English waters, would it have been possible to arrest the *Tervaete* and claim a maritime lien? The well-known decision of *The Parlement*

(1) 7 Moo. P. C. 267, 284. (2) [1897] P. 226.

Belge (1) compels the answer in the negative. Neither the Belgian Government could have been sued in personam, nor could their ship have been arrested in rem. If this is so, I do not understand how there could then be any maritime lien on the ship. To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property, for such a lien about to arise must reduce the price paid to the Government and so affect the property of the Government.

The general language of Lord Watson in *The Castlegate* (2), that "a proper maritime lien must have its root in the personal liability of the owner," approving the language of Lord Esher to the same effect in *The Parlement Belge* (3), and the similar language of Sir Francis Jeune in *The Utopia* (4), appear to me entirely to support this view, even if that general language is not applicable, as Gorell Barnes J. in *The Ripon City* (5) thought it was not, to the complicated facts in that case. And while I agree with the President that the passage in *The Parlement Belge* (3) was not strictly necessary to Brett L.J.'s decision, yet it was so closely related to it that coming from such a master of maritime law I have no hesitation in following it, especially as I agree with it in principle. Brett L.J. says: "The property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached." In the present case no lien attached against the Belgian Government, nor could their ship have been arrested in rem. But if they could only sell the ship subject to the lien, their property would be affected by the lien, in that they would receive less than the value of the ship free from encumbrances

(1) 5 P. D. 197.
(2) [1893] A. C. 38, 52.
(3) 5 P. D. 197, 218.
(4) [1893] A. C. 492, 499.
(5) [1897] P. 226.

C. A. 1922

THE TERVAETE.

Scrutton L.J.

or liens. The result would be that our law would assert a right over the property of a foreign sovereign not arising from any voluntary action on his part, which adversely affected his property.

I agree that a sovereign may call upon us to enforce legal rights in his favour. *The Newbattle* (1) shows that if he does so, we may refuse to enforce those rights unless he allows the legal rights we recognize to be effectively enforced against him. I agree that cases like *Gladstone* v. *Musurus Bey* (2) and *Larivière* v. *Morgan* (3) show that where English trusts are concerned, this Court will proceed though foreign sovereigns' rights are concerned, while, on the other hand, *Vavasseur* v. *Krupp* (4) involves the proposition that this country will not enforce English patent rights against property in the jurisdiction which a foreign sovereign claims. I am disposed to agree that the ground of the decisions is that though there are English rights, we do not enforce them against a foreign sovereign directly or indirectly because of the comity of nations. But it respectfully appears to me that the error of the President's judgment is that he is enforcing rights against a foreign sovereign indirectly, when he supports the view that over his property there is by English law an inchoate lien which will diminish the value of that property by lowering the price that a private purchaser will give for it.

I appreciate that the matter becomes of international importance, if states increase their commercial trading by national fleets. I have already in *The Porto Alexandre* (5) expressed my views on the disadvantages of state immunity in such circumstances. But the remedy is, in my opinion, state agreements by diplomatic action, not infringement of legal principles based on the comity of nations.

For these reasons I think the appeal must be allowed with costs here and below, and the writ against the *Tervaete* set aside.

(1) 10 P. D. 33.
(2) (1862) 1 H. & M. 495; 32 L. J. (Ch.) 155.
(3) (1872) L. R. 7 Ch. 550.
(4) (1878) 9 Ch. D. 351.
(5) [1920] P. 30.

ATKIN L.J. This case raises a question of considerable importance. I have found it difficult, and I differ from the reasoning of the learned President with hesitation; but having formed a judgment which is not in agreement with his conclusion I must express it.

I understand the argument made by the respondents and enforced by the President to be this. Collision damage caused by the negligent navigation of a ship creates a right in the person injured to recover damages from the owner responsible for the navigation. It also creates a right in the person injured to a maritime lien over the ship, so causing damage. That lien is not a possessory lien; but consists of the right by legal proceedings in an appropriate form to have the ship seized by the officers of the Court and made available by sale if not released on bail to pay the collision damage. If the ship is the property of a foreign sovereign it is admitted that legal proceedings cannot be commenced against him either personally or in rem—i.e., for the arrest of the ship—because by comity of nations no process can be brought in the Courts against the person or the property of a foreign sovereign. But this is only a personal privilege of the sovereign not to be impleaded. The right of the injured person to damages and to a lien still exists; and as the right to a lien is not abrogated when the ship is transferred into the property of a third person, so when the ship formerly owned by the foreign sovereign becomes the property of a third person not protected by the personal privilege of the sovereign, the right to a lien becomes effective, and the necessary proceedings in rem may be taken against the ship. The right to a maritime lien, it is said, is equivalent to a charge created by the voluntary hypothecation of a chattel by the sovereign, a charge which may not be capable of enforcement while the chattel is in the possession or ownership of the sovereign, but can be enforced as soon as it is transferred to the property of a third person.

A part of this reasoning is irresistible. It seems to me correct to say that the acts of a foreign sovereign may constitute breaches of contract or of duty not arising from

C. A. 1922

THE TERVAETE.

Atkin L.J.

contract which create rights in the other party. True, such rights may be of little value, as they cannot ordinarily be enforced by action. But the inability is a mere personal inability to sue; they can be made effective in defence as, for instance, by set-off where the rights give rise to a power of set-off; and, as I should suppose, by a plea of contributory negligence; and should the sovereign submit to the jurisdiction in respect of a claim based upon such rights, I apprehend that the Court would be bound to give effect to them.

But in my judgment upon a true analysis of what is meant by a maritime lien the right to such a lien is not such as can be created at all by the act of a sovereign. It is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a Court of law to have the ship seized, and, if necessary, sold. The action in rem is an action in which the owners of the ship are named as parties to the proceedings and in which, according to our procedure, if they appear, subject to the statutory right to limit liability, they will be made liable personally for the full damage regardless of the value of the res. The owner, therefore, in such an action is directly impleaded. But whether it be directly or indirectly, the owner who is a foreign sovereign cannot be impleaded at all. The result appears to me to be that the maritime lien against a foreign sovereign cannot exist at all. A right which can only be expressed as a right to take proceedings seems to me to be denied where the right to take proceedings is denied. No independent liability of the sovereign such as a liability for debt or damages remains pendent protected only by an immunity from legal proceedings. The right of maritime lien appears, therefore, to be essentially different from a right of property hypothec or pledge created by the voluntary act of the sovereign. If this reasoning be correct, inasmuch as there never was a time during the ownership of the Belgian Government when the respondents could aver that they possessed a maritime lien over the *Tervaete*, there was no obligation which attached to the ship or to the new owners

when the ship became their property. On the explanation of the origin of a maritime lien given by Jeune P. in *The Dictator* (1), one may perhaps be allowed to wonder how such a right avowedly dependent upon the personal liability of the owner could be held to be enforceable against a new owner not in any way personally liable for the collision. It is too late to raise a doubt as to this point after the decision of *The Bold Buccleugh*. (2) But where there was no right against the old owner, the new owner must escape. I myself should in any case feel bound by the dictum of Lord Esher in *The Parlement Belge* (3), referred to in the judgment of the President.

I have thought it necessary to state my views on this difficult question in my own way, because I am not sure that I feel so much pressed as my brothers with the contention that a dormant maritime lien over a foreign sovereign's ship would affect the value of the ship in his hands, and therefore must be negatived. The supposition that the liability existed as for personal claims, but was merely unenforceable, does not seem necessarily to be invalidated by the fact that such liability would impose pecuniary disadvantages upon the sovereign. A voluntary pledge or hypothec would be attended with the same results, but would it not be valid ? I do not, however, dissent from their view. I concur in the views taken by my brothers of the cases cited by them and of their bearing on this case. I only desire to add a word or two on *The Newbattle* (4) in the Court of Appeal. There the Court held that upon the construction of the Admiralty Court Act, 1861, where a foreign Government had brought an action in rem against the owners of the *Newbattle*, an order could be made staying the action until security had been given by the plaintiffs to answer the cross-claim of the defendant in respect of the same collision. The relevance of the case is that under the section a condition precedent of such an order is that the plaintiffs' ship cannot be arrested, and the decision of the Court proceeds upon

(1) [1892] P. 304.
(2) 7 Moo. P. C. 267.
(3) 5 P. D. 197.
(4) 10 P. D. 33.

C. A. 1922

THE TERVAETE.

Atkin L.J.

the ground that though the foreign sovereign had invoked the jurisdiction of the Court and though he was under possible liability for damages in an effective cross-suit, yet his ship was exempt from arrest. That a maritime lien was not enforceable under such circumstances appears to afford strong support for the view that it did not exist at all.

For these reasons I think the appeal must be allowed and the order made as stated by Bankes L.J.

Appeal allowed.

Solicitors for the appellants: *Downing, Middleton & Lewis, for Downing & Handcock, Cardiff.*

Solicitors for the respondents: *Holman, Fenwick & Willan, for Lean & Lean, Cardiff.*

E. C. M. T.

1922 *July* 17.

In the Estate of JOHN BROGAN (DECEASED).

Administration—Practice—Resealing Administration Order granted by the High Court of Justice in Northern Ireland—Affidavit as to Estate Duty—Security—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 28, *sub-s.* 5; 69—*Government of Ireland* (*Resealing of Probates, etc.*) *Order*, 1922 (*Statutory Rules and Orders*, 1922, *No.* 81), 3.

When letters of administration granted by the High Court of Justice in Northern Ireland are deposited for the purpose of being resealed in England, the Court will require an affidavit accounting for estate duty with respect to the assets in England pursuant to the Government of Ireland (Resealing of Probates, etc.) Order, 3, and a bond with regard to the assets in England in the same form as would be required in the case of the same assets on an application for an original grant of Probate under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

JOHN BROGAN of Drinn Domara in the county of Down, Ireland, died in the year 1922, domiciled in Ireland, leaving personal estate of the value of 378*l.* 9*s.* in Ireland, and 209*l.* in England, but no real estate. Administration to his estate was granted by the High Court of Justice in Northern Ireland to Edward Brogan, his brother and next of kin, on May 8, 1922. Estate duty on the whole amount was paid in Ireland at the rate of 2 per cent. on April 26.

1922

JOHN BROGAN, *In the Estate of.*

Application was made to the Registry of the Probate Division for the resealing of this grant, but the Registry refused to reseal without the direction of the Court.

The administrator now moved that the grant should be resealed.

R. O. Sullivan for the motion cited *In the Estate of Robert Gault.* (1)

THE PRESIDENT (SIR HENRY DUKE). This is an application for the resealing of a grant of administration made by the High Court of Justice in Northern Ireland under the Government of Ireland Act, 1920. Questions of administration necessarily arise where there is estate both in Ireland and in England.

In *In the Estate of Robert Gault* (1) lately decided by me, which was a case of Probate, I intimated that when the resealing of a grant of administration in Ireland was asked for, proper security would have to be given for the due administration of English assets.

There are two obligations upon an administrator, one is the payment of estate duties, and the other the due administration of the estate. Formerly the two countries had a common exchequer. At present there are duties payable in Ireland on property there, and duties payable here on property in this jurisdiction.

In the present case a slight error has crept in, as all estate duties have been received by the authorities of Northern Ireland. There must, however, be proper security for the payment of English duties, the effect of the Government of Ireland Act, 1920, s. 28, sub-s. 5, being that these latter are payable here.

By the Government of Ireland (Resealing of Probates, etc.) Order, 1922, 3, there is substituted for the certificate heretofore required of estate duty having been already paid on the issue of the original grant, an affidavit to be delivered to the Court here, accounting for the estate duty upon the assets

(1) [1922] P. 195.

1922

JOHN BROGAN, *In the Estate of.*

The President.

within the English jurisdiction. An affidavit will accordingly be filed setting forth the facts upon which duty becomes payable here, and that affidavit will be verified by official scrutiny in the usual way. When the affidavit, so verified, is produced, the first duty of the administrator will have been accomplished, and there will remain the execution of a bond to ensure due administration. In due course, perhaps, by comity there will be introduced a form of bond available in either jurisdiction. For the present, however, it will be necessary to produce a bond in the form which would be required on a grant under the Court of Probate Act, 1857.

The result is that resealing will take place upon the usual administrator's oath as to the assets in England, and the execution of the usual bond with two witnesses.

Solicitor : *Herbert Z. Deane.*

J. R. B.

1922

July 19.

DIVORCE.

POWELL *v.* POWELL.

Divorce—Definition of Desertion—Refusal of matrimonial Cohabitation—Occupation of joint Residence.

The occupation of a separate dwelling house is not a necessary ingredient in the matrimonial offence of desertion of a wife. That desertion for two years may be constituted by the refusal for that period of matrimonial cohabitation. The forsaking the wife's bed, avoiding her society, and seclusion of himself from her in a separate part of a common residence may amount to such refusal by the husband.

WIFE'S petition for divorce on the grounds of desertion for two years and adultery.

The parties were married in 1907 and a child was born in 1910. In 1919, the husband began to sleep in a separate room in a separate and self-contained part of the house with a separate entrance from the street. From that time onward until November, 1921, when he left the house, he refused all association with his wife. He made her an allowance,

but his only intercourse with her during this period was that he wished her "good morning." He also threatened to bring another woman into the house. In January, 1922, he wrote a letter to his wife in which he said: "I wanted to be done with you two years ago." Meanwhile he had removed to another residence, and had been seen there with the woman with whom adultery was alleged.

The case was undefended.

G. C. Tyndale for the petitioner. I submit that desertion for two years, from the date in 1919 when the husband began to lead a separate life, is proved. The subsequent misconduct supports the evidence that an intention to desert was formed at an earlier date.

In *Wily* v. *Wily* (1) Hill J. granted a decree for restitution of conjugal rights on evidence of similar conduct, holding, on the authority of *Forster* v. *Forster* (2), that matrimonial cohabitation could be enforced, though sexual intercourse could not; and that a wife must be treated as a wife.

He also referred to *Sickert* v. *Sickert* (3); *Synge* v. *Synge* (4); and *Reg.* v. *Leresche.* (5)

LORD BUCKMASTER [after finding adultery established:] The only difficulty in this case is on the question of desertion. It is an offence difficult to define. Neglect or contempt, however hard to bear, do not constitute desertion. In this case, however, the evidence of the wife, which I accept, I think entitles me to hold that she has been deserted. In March, 1919, her husband forsook her bed, avoided her society, shut himself in a separate part of the house, refused her access to it, and told her he was introducing another woman; and this condition continued until November, 1921, when he found rooms elsewhere and left the house. Except that these two persons were sheltered by one and the same roof, there was desertion of this wife by her husband in every

(1) [1918] P. 1.
(2) (1790) 1 Hagg. Cons. 144.
(3) [1899] P. 278.
(4) [1900] P. 180, 196.
(5) [1891] 2 Q. B. 418.

1922

POWELL v. POWELL.

Lord Buckmaster.

meaning of the word. I am unable to see that the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 16, 27, requires, in order that desertion should be constituted, a separate dwelling house.

There will be a decree nisi, and an order for costs and for the custody of the child. I will add that a difficult question would have been avoided if the wife had taken proceedings for restitution of conjugal rights.

Solicitors: *Sterns.*

J. R. B.

1922

July 10, 29.

DIVORCE.

DAYRELL-STEYNING *v.* DAYRELL-STEYNING.

Divorce—Permanent Maintenance of Wife—Proportion of Husband's Income —Deduction of Super Tax and Income Tax.

In estimating the income of a divorced husband in order to ascertain the permanent maintenance to be paid to the wife, the husband's income must be regarded as the disposable amount which remains in his hands after paying the expenses of earning it. Those expenses include his liabilities for income tax, super tax and excess profits duty. Therefore all these must be deducted to arrive at the income, one-third of which is to be allowed for the wife's maintenance. The sum so allowed must be paid to the wife free of income tax and super tax, if the latter is payable.

THE wife obtained a decree nisi against her husband for divorce on November 14, 1919, which was made absolute on June 7, 1920. There were four children of the marriage, two had attained twenty-one and two were infants; the custody of the infants was given to the wife. The wife petitioned for permanent maintenance and variation of the settlement. The registrar reported that the respondent carried on a successful business from which he received an annual income averaging, for the three years ending 1920, the sum of 3259*l.* after deducting income tax; that he was also entitled under the settlement to 296*l.* a year, and from investments to 352*l.* a year, making an annual income of 3907*l.*, and recommended

that his interest under the settlement should be extinguished, and that he should be ordered to pay his wife for maintenance during their joint lives 80*l.* a month and 9*l.* 6*s.* 8*d.* a month for each child.

Both parties moved to vary the report, the wife on the ground that the husband ought to be ordered to secure the payment to her of the 80*l.* a month, and that the permanent maintenance ought to be calculated from the husband's gross income without deducting super tax. The husband contended that the amount of permanent maintenance should be reduced to 58*l.* a month, being one-third of his actual drawings from the business, the balance of the profits having been properly carried to reserve, and that income tax must be deducted from the amount paid to the wife.

These motions came on to be heard on July 10.

T. Bucknill for the wife.

T. J. O'Connor (*Cotes-Preedy* with him) for the husband.

Cur. adv. vult.

July 29. THE PRESIDENT (SIR HENRY DUKE) delivered the following interim judgment on the question of deduction of super tax: The respondent carries on a considerable and successful business, and before the registrar one of the main questions was what was to be regarded as the profit arising from that business for the purpose of ascertaining the husband's ability to pay permanent maintenance to his wife, and whether both in computing the husband's income and in arriving at the amount of the allowance to be paid to the wife regard must be had to liability for super tax and other taxes. These are questions of some difficulty and questions on which the practice of the Court should be clearly laid down for the guidance of litigants.

The parties were greatly at variance about the amount of the true profits of the business for this purpose. The amount of the trading profits was agreed, and also the amount of profits for the purposes of income tax; but I do not consider

1922

DAYRELL-STEYNING v. DAYRELL-STEYNING.

The President

that either amount forms the right basis of computation of the husband's income in applications for maintenance. For that purpose the husband's income should be regarded as the disposable amount which remains in his hands after he has provided the necessary expenses for earning his income, and among those expenses are his liabilities for income tax, super tax and excess profits duties.

Another question which arises is of considerable importance in these days in which all of his Majesty's subjects are of necessity heavily taxed, and some more heavily than others. It is what is the proper sum to award to the wife, having regard to her own possible liability to pay income tax and, perhaps, super tax. It was urged that to allow super tax to be deducted from the husband's income would be indirectly to make the amount allotted to the wife subject to super tax, even in cases where the amount allotted is under the limit imposed as regards liability for super tax. A similar question arises having regard to the different amount of income tax for incomes of large and small amounts.

I have considered what is the proper mode of dealing with that question, and the result of a fair consideration of the two questions seems to me to be this: (1.) In ascertaining the husband's total income, his liability for all the King's taxes must be taken into consideration, in order to arrive at the amount in truth disposable by him for his own purposes; (2.) as to the proportion of the income allotted to the wife by way of maintenance, if the husband's liabilities for taxation are to be taken into account, the wife's liabilities must be taken into consideration also. The sum should be worked in this way: In ordinary cases, where one-third of the husband's income is allotted to the wife by way of maintenance, the amount allotted should be such a sum free from income tax and super tax as will amount to one-third of the total fund, that fund also being discharged from King's taxes. The distributable fund should be tax free, and the relative proportion should also be tax free.

I have put this case in the paper to-day because it raises this question in a convenient form for me to pronounce my

judgment on a matter which arises, not only in this case, but in numerous other cases.

[The final judgment on the motions was postponed until after the Vacation, that figures might be agreed upon the basis of the interim judgment.]

Solicitors for petitioner: *Hasties.*

Solicitors for respondent: *Emmet & Co.*

J. R. B.

END OF VOL. AND OF PROBATE SERIES FOR 1922.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1922, will be as follows :—

In the First Series,

[1922] 1 Ch. [1922] 2 Ch.

In the Second Series,

[1922] 1 K. B. [1922] 2 K. B. [1922] P.

In the Third Series,

[1922] 1 A. C. [1922] 2 A. C.

INDEX.

ABATEMENT — Damages — Death of respondent - - - - - 34
See DIVORCE.

ACTION—In rem.
See SHIPPING.

ADMINISTRATION—Enemy's property in England - - - - - 30
See PROBATE.

—— Resealing administration order - 276
See PROBATE.

ADMINISTRATION OF JUSTICE ACT 235

ADMIRALTY.
See SHIPPING.

APPEAL—By intervener in divorce suit 144
See DIVORCE.

ARREARS—Maintenance—Discretion as to enforcement - - - 187
See DIVORCE.

ARREST—Immunity from—Maritime lien—State-owned vessel sold into private ownership - - - - - 259
See SHIPPING.

ASSISTANCE—Statutory duty to render 243
See SHIPPING.

AUTHORITY—Of ship's agents to settle action - - - - - 162
See SHIPPING.

BAIL—Full value of ship—Seizure by sheriff for interest and costs - - 213
See SHIPPING.

—— Right of cargo-owners to claim against bail procured by shipowners - 92
See SHIPPING.

BARGES—Limitation on tonnage of dumb barges - - - - - 175
See SHIPPING.

BOUNTY—Prize - - - - - 73
See PRIZE COURT.

CASES :—

—— *Bourne* v. *Bourne* - [1913] P. 164
Followed. LISTER *v.* LISTER - 227

—— *Candy* v. *Maugham* (1843) 6 Man. & G. 710.
Followed. THE MOGILEFF (No. 2) 122

—— *Hankinson* v. *Barningham* (1883) 9 P. D. 62.
Overruled by R. S. C., O. XIX., r. 25A. *In the Estate of* THE EARL OF SHREWSBURY (DECEASED). MCLEOD *v.* SHREWSBURY (EARL OF) 112

—— *Lipman* v. *Lipman* - [1916] P. 25
Not followed. LISTER *v.* LISTER 227

—— *Lord Salisbury* v. *Nugent* (1883) 9 P. D. 23.
Overruled by R. S. C., O. XIX., r. 25A. *In the Estate of* THE EARL OF SHREWSBURY (DECEASED). MCLEOD *v.* SHREWSBURY (EARL OF) 112

—— *Ran, The ; Graygarth, The* [1922] P. 80
Considered and explained. THE HARLOW - - - - - 175

—— *Thompson* v. *Thompson* - [1916] P. 165
Followed. LISTER *v.* LISTER - 227

—— *Union Steamship Co.* v. *Owners of the Aracan* (*The American and the Syria*) (1874) L. R. 6 P. C. 127.
Explained and distinguished. THE RAN ; THE GRAYGARTH - 80

CASES—*continued.*

—— *Wallace* v. *M'Dowell* [1920] 2 I. R. 194 Not followed. IN THE ESTATE OF THE EARL OF SHREWSBURY (DECEASED). MCLEOD *v.* SHREWSBURY (EARL OF) - - - - - 112

COHABITATION—Refusal of — Occupation of joint residence - - - 278
See DIVORCE.

COLLISION.
See SHIPPING.

COLONIAL PROBATES ACT, 1892 - 235

CONTRACT—Loss of beneficial contract to salve wreck - - - - - 9
See SHIPPING.

CONTROLLER—Of clearing office, grants to 30
See PROBATE.

CO-RESPONDENT.
See DIVORCE.

CORPORATION—Principal place of business in colony—Grant of probate to 235
See PROBATE.

COSTS—Allowance to seafaring witness 4
See SHIPPING.

—— Condemnation of co-respondent—Knowledge that respondent was married
See DIVORCE. 1

—— Liability for, after bail given in full value of ship - - - - 213
See SHIPPING.

—— Sheriff's—Priorities as between sheriff and maritime lien holder - 256
See SHIPPING.

CRUELTY.
See DIVORCE.

DAMAGES—Against co-respondent—Knowledge that respondent was married 1
See DIVORCE.

—— Divorce—Claim for, distinct cause of action - - - - - - 34
See DIVORCE.

—— For loss of beneficial contract to salve wreck - - - - - - 9
See SHIPPING.

—— Remoteness — Stranding while rendering assistance - - - 243
See SHIPPING.

DECLARATION — Against proprietary interest—Lost will - - - 240
See PROBATE.

DECREE NISI—Effect in undefended suit of successful appeal by intervener 144
See DIVORCE.

DESERTION—Refusal of matrimonial cohabitation — Occupation of joint residence - - - - 278
See DIVORCE.

DETENTION—Seafaring witness—Costs 4
See SHIPPING.

DISCRETION—Costs and damages where co-respondent does not know that respondent was married - - 1
See DIVORCE.

DIVORCE — *Definition of Desertion — Refusal of Matrimonial Cohabitation — Occupation of joint Residence.*
POWELL *v.* POWELL - **Lord Buckmaster 278**

2. —— *Order for varying Settlement under the Matrimonial Causes Act,* 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Bequest by Will of Petitioner's Father to Trustees of Marriage Settlement upon Trusts thereof—Jurisdiction of Court—Meaning of "settlement."*
GARRATT *v.* GARRATT AND GARRATT
Hill J. 230

3. —— *Permanent Maintenance of Wife—Proportion of Husband's Income—Deduction of Super Tax and Income Tax.*
DAYRELL-STEYNING *v.* DAYRELL-STEYNING
Duke, Pres. 280

4. —— *Practice — Decree Nisi on Husband's Petition—Co-respondent ordered to pay Damages into Court—Damages paid in—Death of Respondent before Decree Absolute—Abatement — Claim for Damages a distinct Cause of Action.*
MONSELL *v.* MONSELL AND CAIN
Duke, Pres. 34

5. —— *Practice — Deed of Separation—Covenant not to institute Proceedings—Proviso that Covenants should be void if Parties were judicially separated on the Ground of Misconduct by either after the Date of Deed—Wife's Petition for Dissolution — Husband's Cruelty before Deed and Adultery after it proved—Wife's Right to Decree without previous judicial Separation.*
LISTER *v.* LISTER - **Horridge J. 227**

6. —— *Practice — Desertion — Order by Court of Summary Jurisdiction for Maintenance of Wife on the Ground of the Husband's Desertion—Provision for Non-cohabitation—Amendment of Order by Court of Summary Jurisdiction—Effect on the Running of Time for Desertion—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39), *s.* 5.
BOULTON *v.* BOULTON - **Horridge J. 229**

7. —— *Practice — Knowledge of Co-respondent that Respondent was married — Damages — Costs — Discretion of Judge — Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 51—*Judicature Act,* 1890 (53 & 54 *Vict. c.* 44), *s.* 5—*Statute Law Revision Act,* 1892 (55 & 56 *Vict. c.* 19), *s.* 1.
SMITH *v.* SMITH AND REED - **Duke, Pres. 1**

DIVORCE—*continued.*

8. —— *Practice—Restitution of Conjugal Rights — Periodical Payments for Maintenance of Wife—Deduction of Super Tax — Acquiescence — Construction of Order — Arrears—Discretion of Court—Matrimonial Causes Act,* 1884 (47 & 48 *Vict. c.* 68), *s.* 2.
CAMPBELL *v.* CAMPBELL - **Duke, Pres. 187**

9. —— *Practice—Separation Deed— Usual Covenants— Antecedent Debts.*
BRAILEY *v.* BRAILEY
Duke, Pres. and C. A. 15

10. —— *Restitution of Conjugal Rights — Sincerity of Applicant—Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *ss.* 17, 22 — *Matrimonial Causes Act,* 1884 (47 & 48 *Vict. c.* 68), *s.* 5.
MANN *v.* MANN - **Duke, Pres. 238**

11. —— *Wife's Petition— Adultery charged against one Person on one specified Occasion — Suit not defended by Husband— Intervention of Person charged—Decree Nisi granted — Appeal by Intervener — Intervener dismissed from Suit—Effect on Decree Nisi—Petition dismissed—Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *ss.* 29, 30.
RUTHERFORD *v.* RUTHERFORD - **C. A. 144**

DOCK-OWNERS—Rights of detention — Priorities - - - - - **41**
See SHIPPING.

ENEMY PERSON—Will—Property in England - - - - - - **30**
See PROBATE.

EVIDENCE—Lost will—Declaration of deceased person against proprietary interest - - - - - **240**
See PROBATE.

FI. FA.—Writ of—Sheriff's costs under—Priorities - - - - - **256**
See SHIPPING.

GOVERNMENT OF IRELAND ACT - 195, 276
See PROBATE.

GOVERNMENT OF IRELAND (RESEALING OF PROBATES, &c.) ORDER 276
See PROBATE.

HUSBAND AND WIFE.
See DIVORCE.

INCOME—Wife's maintenance — Deduction of super tax and income tax - **280**
See DIVORCE.

INTEREST—Liability for, after bail given in full value of ship - - - **213**
See SHIPPING.

INTERPLEADER—Summons directed to Crown - - - - - **122**
See SHIPPING.

INTERVENTION—Of person charged with adultery—Effect on decree nisi of successful appeal - - - **144**
See DIVORCE.

JOINT RESIDENCE—Definition of desertion
See DIVORCE. **278**

JUDICIAL SEPARATION.
See DIVORCE.

JURISDICTION—State-owned vessel sold into private ownership - **197, 259**
See SHIPPING.

KING'S SHIPS—Application of Maritime Conventions Act - - - **209**
See SHIPPING.

KNOWLEDGE—Of co-respondent that respondent was married - - **1**
See DIVORCE.

LIEN—State-owned vessel sold into private ownership - - - **197, 259**
See SHIPPING.

LIMITATION—Of liability **41, 80, 175**
See SHIPPING.

MAINTENANCE—Deduction of taxes in calculating income - - **187, 280**
See DIVORCE.

MARITIME LIEN—State-owned vessel sold into private ownership **197, 259**
See SHIPPING.

MARRIAGE SETTLEMENT—Power to vary trusts of will when gift by will is to trustees of settlement - - **230**
See DIVORCE.

MATRIMONIAL CAUSES ACTS 144, 187, 230, 238
See DIVORCE.

MERCHANT SHIPPING ACTS 41, 80, 175, 243
See SHIPPING.

MERSEY DOCKS AND HARBOUR BOARD—Statutory powers of detention—Priorities - - - - - **41**
See SHIPPING.

NAVAL AGENCY AND DISTRIBUTION ACT
See SHIPPING. **162**

NAVY AGENTS—Authority of - - **162**
See SHIPPING.

NORTHERN IRELAND—Probate granted by High Court of Justice in—Resealing
See PROBATE. **195**

PRACTICE—Admiralty.
See SHIPPING.
—— Divorce.
See DIVORCE.
—— Probate.
See PROBATE.

PRIORITIES—Dock-owner's, under statutory powers of detention - - **41**
See SHIPPING.

—— Sheriff's costs - - - - **256**
See SHIPPING.

PRIZE BOUNTY.
See PRIZE COURT.

PRIZE COURT—*Prize Bounty—Naval Capture—Joint Naval and Military Operations—Naval Prize Act*, 1864 (27 & 28 *Vict. c.* 25), *s.* 42.

In the Matter of the MESOPOTAMIA OPERATIONS, 1917. THE SULMAN PAK AND OTHER VESSELS - - - - **Duke, Pres. 73**

PROBATE — *Administration — Practice — Resealing Administration Order granted by the High Court of Justice in Northern Ireland—Affidavit as to Estate Duty—Security—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 28, *sub-s.* 5; *s.* 69—*Government of Ireland* (*Resealing of Probates, etc.*) *Order*, 1922 (*Statutory Rules and Orders*, 1922, *No.* 81), 3.

In the Estate of JOHN BROGAN (DECEASED) **Duke, Pres. 276**

2. —— *Lost Will—Evidence—Declaration of deceased Person against proprietary Interest—Presumption that Person in Possession of Real Property is Owner—Declaration of such Person that he had destroyed Will giving him a Life Interest after the Testatrix's Death—Evidence to rebut Presumption not admitted.*

In re ADAMS. BENTON *v.* POWELL **Horridge J. 240**

3. —— *Practice — Administration — Enemy's Property in England—Death during War—Grant of Administration ad colligenda to Public Trustee—Notice of German Will—Full Grant to Public Trustee with the Will annexed—Notice to German Executors and Beneficiaries dispensed with—Practice as to Grants to Controller of Clearing Office—Treaty of Peace Order*, 1919, *s.* 1, *sub-s. xvi.*—*Treaty of Peace of June* 28, 1919, *s. iv.*, *art.* 297.

In the Estate of GEORG VON DEM BUSCHE (DECEASED) - - - **Duke, Pres. 30**

4. —— *Practice — Resealing Colonial Grant of Probate — Original Grant to a Corporation having its principal Place of Business in a Colony—Colonial Probates Act*, 1892 (55 *Vict. c.* 6), *s.* 2—*Administration of Justice Act*, 1920 (10 & 11 *Geo.* 5, *c.* 81), *s.* 17.

In re MCLAUGHLIN (DECEASED) **Hill J. 235**

5. —— *Practice—Resealing Probate granted by the High Court of Justice in Northern Ireland—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *ss.* 38, 40, 41, 61—*Colonial Probates Act*, 1892 (55 & 56 *Vict. c.* 6).

In the Estate of ROBERT GAULT (DECEASED) - - - - **Duke, Pres. 195**

PROBATE—*continued.*

6. —— *Practice—Substance of the Case—Rules of the Supreme Court, Order* XIX., *rr.* 6, 25A.—*Unsound Mind—Undue Influence.*

In the Estate of THE EARL OF SHREWSBURY (DECEASED). MCLEOD *v.* SHREWSBURY (EARL OF) - - - - **Duke, Pres. 112**

7. —— *Soldier's Will—"In actual military service"—On an Expedition—Termination of the Expedition—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 11—*Wills* (*Soldiers and Sailors*) *Act*, 1918 (7 & 8 *Geo.* 5, *c.* 58)—*Termination of the Present War* (*Definition*) *Act*, 1918 (8 & 9 *Geo.* 5, *c.* 59).

In the Estate of GREY - - **Hill J. 140**

PUBLIC TRUSTEE—Grant of administration ad colligenda - - - **30**
See PROBATE.

REMOTENESS OF DAMAGE—Stranding while rendering assistance - **243**
See SHIPPING.

RESEALING—Probate granted by High Court of Justice in Ireland - **195**
See PROBATE.

RESPONDENT—Effect of death on claim for damages - - - - **34**
See DIVORCE.

RESTITUTION OF CONJUGAL RIGHTS.
See DIVORCE.

RULES AND ORDERS:—

—— *Government of Ireland* (*Resealing of Probates, etc.*) *Order* 3, 1922: *In the Estate of* JOHN BROGAN (DECEASED) **276**

—— *Peace Treaty Order*, 1919, *s.* 1, *sub-s. xvi.*: *In the Estate of* GEORG VON DEM BUSCHE (DECEASED) - **30**

—— *Supreme Court, Rules of, O.* XIX., *rr.* 6, 25A: *In the Estate of* THE EARL OF SHREWSBURY (DECEASED). MCLEOD *v.* SHREWSBURY (EARL OF) - **112**

—— —— *O.* LVII.: THE MOGILEFF - **122**

SALVAGE—Loss of beneficial contract to salve wreck - - - - **9**
See SHIPPING.

SEPARATION DEED—"Usual" covenants
See DIVORCE. **15**

SETTLEMENT—Meaning of—Bequest by will to petitioner's father to trustees of marriage settlement upon trusts thereof - - - - **230**
See DIVORCE.

—— Power to vary - - - - **230**
See DIVORCE.

SHERIFF—Costs—Priorities - - 256
See SHIPPING.

SHIPPING—*Authority of Ship's Agents — Settlement of Action contrary to express Prohibition of Principal — Breach of Duty — Damages — Naval Agency and Distribution Act*, 1864 (27 & 28 *Vict. c.* 24), *s.* 12.
THE HERMIONE - - - **Hill J. 162**

2. —— *Collision — Action by Shipowners as Bailees of Cargo — Non-assenting Cargo-owners — Rights against Bail — Distribution of Fund.*
THE JOANNIS VATIS - - **C. A. 92**

3. —— *Collision — Damage to sunken Vessel — Action by Salvors of wrecked Vessel — Possessory Interest in Wreck — Loss of beneficial Contract — Right to sue — Quantum of Damages.*
THE ZELO - - - - **Hill J. 9**

4. —— *Collision — Limitation of Actions — Action by Lords Commissioners of the Admiralty — Writ issued more than Two Years after Cause of Action — Maritime Conventions Act*, 1911 (1 & 2 *Geo.* 5, *c.* 57), *ss.* 8, 10 — *Applicability to King's Ships.*
THE LOREDANO - - **Duke, Pres. 209**

5. —— *Collision — Maritime Lien — Foreign State-owned Vessel — Vessel sold into Private Ownership — Jurisdiction — Arrest.*
THE TERVAETE - - **Duke, Pres. 197; reversed C. A. 259**

6. —— *Collision — Statutory Duty to assist damaged Vessel — Stranding while rendering Assistance — Damage due to Stranding — Direct Cause — Remoteness — Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 422.
THE SAN ONOFRE - - - **C. A. 243**

7. —— *Collision — Tug and Tow in same Ownership — Negligence on the Tug — Limitation of Liability — Decree of Limitation on Tonnage of Tow — Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 503.
THE RAN; THE GRAYGARTH - **C. A. 80**

8. —— *Collision Damages — Action in Rem — Bail in full Value of Ship — Seizure for Interest and Costs — Mode of Execution — Liability in Personam — Writ of Fi. Fa.*
THE JOANNIS VATIS (No. 2) **Duke, Pres. 213**

9. —— *Collision with Dock Gates — Dock-owners' Rights of Detention — Statutory Powers of the Mersey Docks and Harbour Board — Limitation of Liability — Priorities — Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 94 — *Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504 — *Merchant Shipping (Liability of Shipowners and Others) Act*, 1900 (63 & 64 *Vict. c.* 32), *ss.* 1, 3 — *Mersey Docks and Harbour Act*, 1912 (2 & 3 *Geo.* 5, *c. xii.*), *s.* 7.
THE COUNTESS - - - **C. A. 41**

SHIPPING—*continued.*

10. —— *Limitation of Liability — Tug and Tows in same Ownership — Limitation of Tonnage of Dumb Barges as "ships" — Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 2, 503, 742 — *Merchant Shipping (Liability of Shipowners) Act*, 1898 (61 & 62 *Vict. c.* 14), *s.* 1 — *Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 85, *Sch. II.*
THE HARLOW - - - **Duke, Pres. 175**

11. —— *Practice — Costs — Allowance to seafaring Witness — Measure of Compensation for Detention — Guiding Principles.*
THE IBIS VI. (No. 2) - **Duke, Pres. 4**

12. —— *Practice — Interpleader — Summons directed to the Crown — Ships registered in name of His Majesty represented by the Shipping Controller — Issue as to Ownership — R. S. C., O.* LVII. — *Writ of venditioni exponas.*
THE MOGILEFF (No. 2) - **Hill J. and C. A. 122**

13. —— *Priorities — Seizure of Ship by Sheriff under Writ of fi. fa. — Arrest by Marshal in Action for Wages and Disbursements — Sheriff's Costs.*
THE ILE DE CEYLAN - - **Hill J. 256**

SHIP'S AGENTS—Authority of - - 162
See SHIPPING.

SOLDIER'S WILL—"In actual military service" - - - - - 140
See PROBATE.

STATE-OWNED VESSEL—Sold into private ownership—Lien - - 197, 259
See SHIPPING.

STATUTES:—
1. PUBLIC GENERAL.

1837.
1 Vict. c. 26 (Wills), s. 11: *In the Estate of* GREY - - - - - 140

1857.
20 & 21 Vict. c. 85 (Matrimonial Causes), ss. 17, 22: MANN *v.* MANN - 238
—— —— ss. 29, 30: RUTHERFORD *v.* RUTHERFORD - - - 144
—— —— s. 51: SMITH *v.* SMITH AND REED 1

1859.
22 & 23 Vict. c. 61 (Matrimonial Causes), s. 5: GARRATT *v.* GARRATT AND GARRATT - - - - 230

1864.
27 & 28 Vict. c. 25 (Naval Prize), s. 42: *In the Matter of the* MESOPOTAMIA OPERATIONS, 1917. THE SULMAN PAK AND OTHER VESSELS - 73
27 & 28 Vict. c. 28 (Naval Agency and Distribution), s. 12: THE HERMIONE - - - - 162

STATUTES—*continued.*

1884.

47 & 48 Vict. c. 68 (Matrimonial Causes), s. 2: CAMPBELL *v.* CAMPBELL - 187
—— —— s. 5: MANN *v.* MANN - 238

1890.

53 & 54 Vict. c. 44 (Judicature), s. 5: SMITH *v.* SMITH AND REED - 1

1892.

55 Vict. c. 6 (Colonial Probates), s. 2: *In re* MCLAUGHLIN (DECEASED) 235

55 & 56 Vict. c. 19 (Statute Law Revision), s. 1: SMITH *v.* SMITH AND REED 1

1894.

57 & 58 Vict. c. 60 (Merchant Shipping), s. 422: THE SAN ONOFRE - 243
—— —— s. 503: THE RAN; THE GRAYGARTH - - - - - 80
—— —— ss. 503, 504: THE COUNTESS 41
—— —— ss. 503, 742: THE HARLOW 175

1895.

58 & 59 Vict. c. 39 (Summary Jurisdiction (Married Women)), s. 5: BOULTON *v.* BOULTON - - 229

1898.

61 & 62 Vict. c. 14 (Merchant Shipping (Liability of Shipowners)), s. 1: THE HARLOW - - - 175

1900.

63 & 64 Vict. c. 32 (Merchant Shipping (Liability of Shipowners and others)), ss. 1, 3: THE COUNTESS - 41

1906.

6 Edw. 7, c. 48 (Merchant Shipping), s. 85, Sch. II.: THE HARLOW - 175

1911.

1 & 2 Geo. 5, c. 57 (Maritime Conventions), ss. 8, 10: THE LOREDANO 209

1918.

7 & 8 Geo. 5, c. 58 (Wills (Soldiers' and Sailors')): *In the Estate of* GREY 140
8 & 9 Geo. 5, c. 59 (Termination of the Present War (Definition)): *In the Estate of* GREY - - - 140

1920.

10 & 11 Geo. 5, c. 67 (Government of Ireland), s. 28, sub-s. 5: *In the Estate of* JOHN BROGAN (DECEASED) 276
—— —— ss. 38, 40, 41, 61: *In the Estate of* ROBERT GAULT (DECEASED) 195

STATUTES—*continued.*

1920.

10 & 11 Geo. 5, c. 81 (Administration of Justice), s. 17: *In re* MCLAUGHLIN (DECEASED) - - - - 235

2. LOCAL AND PRIVATE.

1858.

21 & 22 Vict. c. xcii. (Mersey Dock Acts Consolidation), s. 94: THE COUNTESS - - - - 41

1912.

2 & 3 Geo. 5, c. xii. (Mersey Docks and Harbour), s. 7: THE COUNTESS 41

STRANDING—While rendering assistance—Remoteness of damage - - 243
See SHIPPING.

SUMMARY JURISDICTION—Amendment of order for maintenance by Court of 229
See DIVORCE.

SUPER TAX—Deduction from income — Maintenance — Restitution of conjugal rights - - - - 187
See DIVORCE.

TAX—Deduction in estimating divorced husband's income - - - 280
See DIVORCE.

TUG AND TOW—Same ownership—Limitation of liability - - - 175
See SHIPPING.

UNDUE INFLUENCE.
See PROBATE.

UNSOUND MIND.
See PROBATE.

"**USUAL COVENANTS**"—In deed of separation - - - - - 15
See DIVORCE.

VENDITIONI EXPONAS—Writ of - 133
See SHIPPING.

VERSAILLES, TREATY OF.
See PROBATE.

WILL—Enemy person's with property in England - - - - 30
See PROBATE.
—— Lost will—Declaration of deceased person against proprietary interest 240
See PROBATE.

WILL—*continued.*
—— Power of Court to vary gift by will to trustees of marriage settlement 229
See DIVORCE.
—— Soldier's—"In actual military service" *See* PROBATE. 140

WITNESS—Allowance for detention—Costs *See* SHIPPING. 4

WORDS:—
—— "In actual military service": *In the Estate of* GREY - - - 140

WORDS—*continued.*
—— "Usual covenants": BRAILEY *v.* BRAILEY - - - - 15

WRECK—Possessory interest in—Loss of beneficial contract of salvage - 9
See SHIPPING.

WRIT—Fi. fa. - - - - - 256
See SHIPPING.
—— Venditioni exponas - - - 133
See SHIPPING.

BIBL. LONDIN. UNIV.

W. SPEAIGHT & SONS, LTD., PRINTERS, 98–99, FETTER LANE, LONDON, E.C. 4.

THE

LAW REPORTS.

Under the Superintendence and Control of the

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

KING'S BENCH DIVISION AND PROBATE DIVISION.

(Including Divorce, Admiralty, Ecclesiastical, and Railway and Canal Commission Cases.)

1922.—VOL. I. K.B. & P.

1 K.B. (p. 69 to p. 213); P. (p. 9 to p. 14).

PART II.—FEBRUARY 1.

TABLE OF CASES.

KING'S BENCH DIVISION.

	PAGE
BOYCE *v.* COX	149
COMMISSIONERS OF WORKS *v.* HULL	205
ELLIOTT STEAM TUG CO. *v.* SHIPPING CONTROLLER (C. A.)	127
HARRISON *v.* HOLLAND (C. A.)	211
KEANE *v.* ASHBOCKING OVERSEERS	143
LONDON COUNTY COUNCIL *v.* WETTMAN	153
NEILSON *v.* LONDON AND NORTH-WESTERN RAILWAY CO. (C. A.)	192
REX *v.* POPLAR BOROUGH COUNCIL (No. 1) (C. A.)	72
REX *v.* POPLAR BOROUGH COUNCIL (No. 2) (C. A.)	95
SMITH *v.* WILLIAMS	158
UNDERWOOD, LD. *v.* BURGH CASTLE BRICK AND CEMENT SYNDICATE	123
UNEMPLOYMENT INSURANCE ACT, 1920, *In re. In re* DR. DAVID. *In re* BRYANT	172
UNEMPLOYMENT INSURANCE ACT, 1920, *In re. In re* JUNIOR CARLTON CLUB	166
UNEMPLOYMENT INSURANCE ACT, 1920, *In re. In re* NORTH AND INGRAM	188

PROBATE DIVISION

	PAGE
ZELO, THE	9

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C 4.

"THE LAW REPORTS, 1922," for February, consist of—

Chancery Division	Part II.
King's Bench and Probate Divisions	Part II.
Appeal Cases	Part I.

EDITOR—RT. HON. SIR FREDERICK POLLOCK, BART, K.C.

ASSISTANT EDITOR OF CURRENT DIGEST—J. S. HENDERSON, *Barrister-at-Law.*

ASSISTANT EDITORS OF WEEKLY NOTES { W. IVIMEY COOK, R. F. STUBBING, } *Barristers-at-Law.*

REPORTERS:

House of Lords	H. B. HEMMING,	*Barrister-at-Law.*
Privy Council	A. M. TALBOT,	*Barrister-at-Law.*
Court of Appeal, No. 1 ..	G. A. STREETEN, W. IVIMEY COOK,	*Barristers-at-Law.*
Court of Appeal, No. 2 ..	W. H. GRIFFITH, J. F. CLERK,	*Barristers-at-Law.*
Mr. Justice Eve .. .. AND Mr. Justice Peterson ..	GEORGE MACAN, R. MORRISON,	*Barristers-at-Law.*
Mr. Justice Sargant .. AND Mr. Justice Russell ..	H. C. GARSIA, P. J. BOLAND,	*Barristers-at-Law.*
Mr. Justice Astbury .. AND Mr. Justice P. O. Lawrence	G. R. ALSTON, H. C. HAWKINS,	*Barristers-at-Law.*
	J. B. B. MACMAHON,	*Barrister-at-Law.*
King's Bench Court of Criminal Appeal, Appeals from County Courts and Railway and Canal Commission Cases.	J. S. HENDERSON, R. F. STUBBING, J. RITCHIE, W. L. L. BELL, F. PORTER FAUSSET, G. H. KNOTT,	*Barristers-at-Law.*
Probate and Divorce ..	J. R. BROOKE,	*Barrister-at-Law.*
Admiralty Cases	E. C. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases ..	C. F. JEMMETT.	*Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

THE LAW REPORTS, 1922 (Unbound).

	£	s.	d.
ENTIRE SERIES (including Statutes, Weekly Notes, and Complete Current Digest).	7	7	0
COMPLETE CURRENT DIGEST, 1922 (a Digest, issued quarterly, of all reported cases) (unbound)	1	1	0
CONSOLIDATED DIGEST, 1865-1890 (a Digest of cases reported in the Law Reports) (in cloth)	4	4	0
DECENNIAL DIGEST, 1891-1900 (ditto) (in cloth)	2	2	0
DECENNIAL DIGEST, 1901-1910 (ditto) (in cloth)	2	2	0
DECENNIAL DIGEST, 1911-1920 (a Digest of all reported cases) (in cloth) ..	4	4	0
WEEKLY NOTES, 1922 (unbound)	1	10	0
INDIAN APPEALS, 1922 (unbound)	1	5	0
INDIAN APPEALS. Digest, 1874-1893 (in cloth)	0	11	6

The Council undertake the binding of their publications. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

PRICES FOR OFFICE PATTERN BINDINGS.

LAW REPORTS. (1921, 9 Vols.).		WEEKLY NOTES. (1921, 1 Vol.).		
		Notes of Cases.	Notes of Cases and Miscellaneous.	
Cloth	6s. 9d. per Vol.	Cloth	7s. 3d. ..	7s. 9d.
Buckram	9s. 3d. ,,	Half-Calf ..	11s. 6d. ..	12s. 3d.
Half-Calf	10s. 9d. ,,	Half-Morocco ..	12s. 9d. ..	13s. 3d.
Half-Morocco	11s. 6d. ,,	Calf	16s. 6d. ..	17s. 9d.
Calf	15s. 0d. ,,			

When the Subscriber's address is more than four miles from the Law Courts a charge of 5s. 6d. is made for cost of carriage of bound Volumes for the Year.

Unbound parts should be sent, carriage paid, to 30, Montague Street, London, W.C. 1 as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made.

The back years of the *Law Reports*, since 1890, and of the *Indian Appeals*, since 1874, may be obtained on application to the Secretary. The *Weekly Notes*, 1891-1914, the *Indian Appeals*, 1889-1893, and the *Law Reports*, 1918, are out of print.

All sums payable to the Council must be prepaid, and (unless a Bankers' Order has been given) should be remitted direct to the Secretary.

Cheques and Money Orders should be made payable to the Council and crossed " & Co., not negotiable." *Banker's Commission must be added to the amount of the Subscription, in case of every remittance from Ireland, Scotland, the Isle of Man, the Channel Islands and Abroad, unless the remittance is made payable in London.*

COMMUNICATIONS should be addressed to

THE SECRETARY, COUNCIL OF LAW REPORTING,

30, Montague Street, London, W.C. 1.

NOW READY.

THE YELLOW BOOK

The Yearly Practice of the County Court 1922.

Special Sections on The County Courts Act and The Rents Act.

Edited by

EDGAR DALE, Esq.

Of the Middle Temple and South Eastern Circuit, Barrister-at-Law.

Price 40s. 0d. net.

Postage 1s. 3d. extra.

BUTTERWORTH & Co.,

BELL YARD, TEMPLE BAR, W.C. 2.